Supreme Court, U.S.
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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

HOLLY LONG,
Petitioner

Vs.

DAWSON SPRINGS INDEPENDENT SCHOOL DISTRICT, DAVID BOGGS, COMMONWEALTH OF KENTUCKY, and STATE DEPARTMENT OF EDUCATION,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Questions Presented

A. Whether the District Court erred in denying the Petitioner's claim for monetary damages, and for greatly expanded "transitional services," under the IDEA and Section 1983 of the Civil Rights Acts.

B. Whether the District Court erred in concluding that a due process hearing was required for jurisdictional purposes in the District Court, rather than the complaint process that had been employed to obtain a State education department decision requiring the "transitional services" be provided to the Petitioner under the IDEA.

PARTIES TO THE PROCEEDINGS

Petitioner is Holly Long.

Respondents are the Dawson Springs, Kentucky, Independent School District, David Boggs, the ex-Superintendent of the Dawson Springs, Kentucky, Independent School District, the Commonwealth of Kentucky, and the State Department of Education of the Commonwealth of Kentucky

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OPINIONS BELOW

The ruling of the United States Court of Appeals for the Sixth Circuit dated August 25, 2006, upholding the decision of the District Court which is not officially reported is reproduced by App. A

The ruling of the United States Court of Appeals for the Sixth Circuit, denying the Petition for Rehearing En Banc was issued November 13, 2006, was not officially reported and is reproduced by App. B

The decision and order of the United States District Court for the Western District of Kentucky dismissing the plaintiff's complaint dated December 20, 2004, which is not officially reported, and is reproduced at App. C

JURISDICTION

The order of the United States Court of Appeals for the Sixth Circuit sought to be reviewed was entered on August 25, 2006, and the decision on the Petition for Rehearing En Banc was entered on November 13, 2006. This petition is timely under 28 U.S.C. Section 2101 and Supreme Court Rule 13.1 because it is being filed within 90 days of the entry of the decision on rehearing. The court has jurisdiction to review the order of the United States Court of Appeals for the Sixth Circuit pursuant to 28 U.S.C. Section 1254.

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are Section 1983 of the Civil Rights Act, 42 U.S.C., and the Individuals with Disabilities Act, 20 U.S.C. 1400,et seq., set our at App.

STATEMENT OF THE CASE

The jurisdiction of the district court was invoked under 28 U.S.C. Section 1331 (general federal question jurisdiction). The plaintiff's two federal claims are based upon allegations that the defendants violated Section 1983 of the Civil Rights Act and Section 1415 of the Individuals with Disabilities in Education Act. The complaint having been dismissed by the district court on defendant's Rule 12(b)(6) motion, the Record consists only of the plaintiff's original complaint

The Decision Below

The District Court Judge, John G. Heyburn II, dismissed the complaint, holding that:

> 1982 there is no basis for a Section 1983 due process clause claim by plaintiff, based on **Crocker v. Tennessee Secondary School Athletic Association**, 980 F.2d 382 (6th Cir. 1992);

2) the plaintiff must exhaust administrative remedies in a due process hearing under the IDEA before bringing claims under other statutes, such as Section 1983;

3) the complaint resolution procedure (CRP) is insufficient to satisfy the IDEA's administrative exhaustion requirements;

4) the Dawson Spring school district should provide the three years of compensatory education to plaintiff as directed by the Kentucky Department of Education, and previously ordered by the district court; and,

5) all of the remaining defendants were dismissed.

The Court of Appeals affirmed the ruling of the district court.

REASONS FOR GRANTING THE PETITION

The district court founded its denial of Section 1983 for IDEA jurisdiction based on **Crocker,** and represented that **Crocker** is consistent with the subsequent prevailing view among the circuits, citing the First, Second, fourth, Seventh, Eighth, and Ninth circuits as so holding.

To the contrary, not only do eight of the twelve circuits (District of Columbia, Second, Third, Fourth, Fifth, Seventh, Eighth, and Ninth) support the view that Section 1983 damages may be applied to IDEA violations, but **Crocker** itself acknowledges that Section 1983 applies to the IDEA actions, but not for damages.

The result of **Crocker** may be to undermine the Court's carefully crafted jurisprudence on Section 1983, a result not likely intended by Congress, when it re-enacted the IDEA in 2004.

ARGUMENT

Initially, the Court's decision of December 20, 2004, although consistent with its previous ruling in dismissing the KDE and the Dawson Springs Superintendent, again conflicts directly with the intent of Congress, as indicated in 20 USC Section 1415(l) "Rule of Construction," and with the overwhelming majority of judicial precedent. The District Court indicates that there is no IDEA civil action that can employ Section 1983 of the Civil Rights Act. The Court is respectfully referred to the legislative history in the House Report on P.L. 105-17, page 124:

"Section 615(l) maintains the rights available under the Constitution, the Americans with Disabilities Act, title V of the Rehabilitation Act and other federal laws."

As codified, that Section 615(l) reads as follows:

> "Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990 [42 U.S.C.A. Section 12101 et seq.] title V of the Rehabilitation Act of 1973 [29 U.S.C.A. Section 791 et seq.], ***or other Federal laws protecting the rights of children with disabilities***, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsection (f) and (g) of this section shall be exhausted to the same extent as would be required had the action been brought under this subchapter." (emphasis supplied)

The overwhelming majority (two-thirds) of federal circuit courts conclude that the IDEA is obviously one of the laws protecting the rights of children with disabilities.

Since the District Court has already concluded that the IDEA does not itself provide for the "relief" of damages against Dawson Springs, it should be apparent that the Plaintiff need not exhaust subsections (f) and (g).

Second, the Court's decision states that the Plaintiff must seek a due process hearing before bringing this matter to the district

court for hearing. Simple reference to the statutory provision indicates that it requires that a prospective plaintiff be "aggrieved" by the KDE decision resulting from Plaintiff's complaint. There is nothing in that KDE decision that aggrieves the Plaintiff, so she has no jurisdictional right to suit in the federal court on the basis of the decision, itself. It is only after both Dawson Springs and the KDE attempted to flout the law by refusing to implement the decision, that plaintiff has a right to a civil action in this Court.

From September, 1998, though well into 2000, Dawson Springs availed itself of the strange "due process" appeal rights accorded it by the KDE, but for which the District Court acknowledges that the District Court can find no legal basis. Even though Dawson Springs has consistently sought to diminish or destroy the Plaintiff's rights to compensatory education, and has never provided a recommended plan of its own (other than a dimunition of Plaintiff's plan). It is apparent that Dawson Springs was the aggrieved party by the KDE Report, that it received overly ample opportunity to contest that Report, but that rather than appealing that Report to a State or federal court, it allowed its appeal rights to lapse --- thus making the Report res judicata. The rule is simple: Dawson Springs contested the KDE report *ad infinitum* in 1998-2000, and that contested Report became final in 2000, with Dawson Springs having failed to exert its further appeal rights. Now, this Court would have the Plaintiff --- having prevailed in the KDE complaint process and Report --- to initiate another process to again prove her right. Put simply, Dawson Springs and the KDE should not be encouraged by this Court to relitigate the claim that they have consistently argued against, either in this jurisdiction, or any other. The finality of the judgment of the validity of the KDE Report has been substituted for their extinguished claims, and only that judgment can be enforced. They are barred from relitigating their claims. The District Court has now concluded that the Plaintiff must subject herself to a due process hearing to be conducted under the auspices of Dawson Springs and the KDE. These two governmental entities have demonstrated every interest in denying the Plaintiff the very benefits for which the IDEA provides. The KDE has admitted the Plaintiff should

receive these benefits. No, it long past time for this Court to take the bull by the horns and enforce the KDE report of September, 1998, rather than to further frustrate the intent of Congress by delaying for additional months while a due process hearing can be convened and completed. Substantial additional costs are being incurred by all the parties before this matter is again brought before this Court. Dawson Springs further demonstrates its obstructionist negativity (that the District Court is so well aware of) and refers to in its decision. The District Court admits its lack of expertise in the filed of education, and has itself appointed Dr. Debra Bauder and Dr.Robert Glass as its advisory experts, yet has failed to accept their written advice that more intense services be provided, and that both physical and occupational therapy be given to Holly Long.

The Congress has repeatedly made evident to the federal courts that it does not want continuing delays, harassment, and dismissal of IDEA related suits initiated to enforce the statute. The Congress in 1986 added Section 1415(f) to the IDEA, because of the Supreme Court's decision in **Smith v. Robertson**, 468 U.S. 992(1984), which held that the IDEA precluded claims under the Rehabilitation Act and the Equal Protection Clause. If Section 1415(f) seems remarkably similar to Section 1415(l) of P.L. 105-17, it says practically the same thing --- "Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, title V of the Rehabilitation Act of 1973, or other Federal statutes protecting the rights of children and youth with disabilities"

As noted above, P.L. 105-17 clearly elaborates on that admonition of congressional intent. Many courts have acknowledged and implemented this congressional intent. This District Court still has not, and Plaintiff is at a quandry as to why not. It is certainly not because Plaintiff has not repeatedly brought this congressional intent to the District Court's attention.

In spite of the District Court's reluctance to accept the application of Section 1983 to this IDEA matter, it still ordered the Dawson Springs School District to initiate and complete three years of transitional training for Plaintiff, in its final order, upon which this appeal is based.

Such disapproval by the District Court of Congress's intent is totally without legal reason, and not indicative of a justice system of law, but of men. Plaintiff provides (below) extensive quotes from the Congressional Record, and the GAO report, indicative of the intent of Congress, and of the extent of the problem in implementing the IDEA. However, immediately following is an extensive discussion of the jurisprudential background as indicated in the Court's decision.

COMPARATIVE JURISPRUDENCE

1982 **Crocker v. Tennessee Secondary School Athletic Association**, 980 F.2d 382 (6th Cir. 1992),

Of course, as the District Court mentions, Plaintiff believes that **Crocker** should be disregarded as precedent in this Sixth Circuit. As the Plaintiff stated in **W.B. v. Matula**, 67 F.3d 484, 494 (3rd Cir. 1995) and **Walker v. District of Columbia,** 969 F.Supp. 794, 796 (D.D.C.1997), explain that "the Sixth Circuit in Crocker did not address the legislative history of Section 1415(f)" and that "Congress added this section to the IDEA in order to overturn the Supreme Court's decision in *Smith v. Robinson*, . . ., in which the Court held that the IDEA precluded claims under the Rehabilitation Act and the Equal Protections Clause. *See W. B. v. Matula* . . . describing in detail the legislative history of Section 1415(f)."

> "Furthermore, as the Supreme Court has held, once a cause of action is established, courts should 'presume the availability of all appropriate remedies unless Congress has expressly indicated otherwise.' *Franklin v. Gwinnett County,* 503 U.S. 60, 66, 112 S. Ct. 1028, 1032, 117 L.Ed. 2d 208 (1992)" (Walker, at 797)

Crocker's basic premise is that money damages are not available for IDEA violations. **W.B.** states: "Section 1983 supplies a private right of action for the instant case. . . . We agree, and thus hold that Plaintiffs may seek monetary damages directly under

Section 504, as well as the Section 1983 claim predicated on Section 504." (at 494)

The Court also refers to **Gardenshire v. Schubert**, 205 F.3d 303 (6th 2000) for the proposition that the Sixth Circuit has said that a Section 1983 lawsuit may not expand existing statutory rights. **Gardenshire** is an arrest without probable cause case, and not on point with **Crocker**, and IDEA jurisprudence.

B. **W. B. v. Matula**, and **Salley v. St. Tammany Parish School Bd.**, 57 F.3d 458 (5th Cir. 1995)

The Court cites **W.B.** and **Salley** as evidence that both the Third and Fifth Circuits addressed the issue of Section 1983 damages, "without stating a definite 'no.'" Plaintiff must take issue with the representation that **W.B.** does anything but unequivocally support the use of Section 1983 --- "Accordingly, section 1983 supplies a private right of action for the instant case." (at 494) Any other representation is inaccurate.

The District Court represents **Salley** as an instance where Section 1983 damages were not provide for, and, indeed, the court in **Salley** does not mention Section 1983, but does say: "The district court acted correctly when it awarded only nominal damages."

The District Court represents that: "despite its brief and less than compelling analysis, *Crocker* is consistent with the subsequent prevailing view among the circuits. . . . The First, Second, Fourth, Seventh, Eighth and Ninth Circuits have also held that damages are unavailable under the IDEA."

Plaintiff has examined such representation, and the cases the Court cites, and has found the following examples to not support that statement:

First Circuit – **Nieves-Marquez v. Puerto Rico**, 353 F.3d 108 (2003) – wherein that court cites **Sellers**, **Crocker**, and **Heidemann**, and that, "The Supreme Court has held that compensatory damages are generally available under both statutes." (Section 504 and Title II) But then the court concludes that, "At this point, we cannot say with certainty that a damages award under Section 504 or title II is precluded on these pleadings, at least for intentional conduct causing economic harm." (at 127) No mention is made of damages under Section 1983 being precluded.

Fourth Circuit – **Sellers v. School Bd. of City of Manassas, Va.** 141 F.3d 524 (1998) – the court argues that Section 1983 protects for Constitutional violations, but not IDEA violations, "notwithstanding the similarity of such claims to those stated directly under the IDEA."(at 530)

> "When construed in their most natural form, the excerpts (of the House report) demonstrate the unremarkable proposition that Congress intended section 1415(f) to restore the ability of disabled children and their parents or guardians to utilize section 1983 to protect constitutional rights." (at 531)

Seventh Circuit – **Charlie F. v. Bd. of Educ. of Skokie School Dist.**, 98 F.3d 989 (1996) – the court bases its conclusion on its previous holding that the Education for All Children Handicapped Act was held not to provide for damages, and that **W.B v. Matula** is in accord with that position. To the contrary, **W.B.** says: "We agree, and thus hold that plaintiffs may seek monetary damages directly under Section 504, as well as the Section 1983 claim predicated on Section 504." (at 494)

Plaintiff has examined in detail that jurisprudence that the District Court cited, and considerably more, and concludes that eight of the twelve circuits have jurisprudence that supports the principle that monetary damages are available under Section 1983 in IDEA matters, and the following presents such precedents and representative statements therefrom:

District of Columbia Circuit –

Samuels v. District of Columbia, 770 F.2d 184, 195 (1985)

Second Circuit –

PC v. McLaughlin, 913 F.2d 1033, 1044 (1990)

Mrs. W. v. Tirozzi, 832 F.2d 748, 755 (1987)

Quackenbush v. Johnson City School District, 716 F.2d 141, 148 (1983)

Third Circuit –

W.B. v. Mastula, 67 F.3d 484, 494 (1995)

Jeremy H. by Hunter v. Mount Lebanon School Dist., 95 F.3d 272, 279 (1996)

Fourth Circuit –

Robinson v. Pinderhughes, 810 F.2d 1270, 1274 (1987)

Fifth Circuit –

Fontenot v. Louisiana Bd. of Elementary & Secondary Educ., 805 F.2d 1222 (1986) – In response to **Smith v. Robinson**, 468 U.S. 992 (1984), Congress "acted swiftly, decisively, and with uncharacteristic clarity to correct what I viewed as a judicial misinterpretation of its intent." Congress amended the Act in 1986 to state specifically that the EHA is not the exclusive avenue through which parents may enforce the rights of their handicapped children. [See: The Handicapped Children's Protection Act of 1986 P.L. No. 99-372 Section 3, 100 Stat. 796 (1986), to be codified as 20 U.S.C. Section 1415(f)]

St. Tammany Parish Sch. Bd. v. State of La., 142 F.3d 776 (1998) – does not refer to Section 1983 action, but states: "See 20 U.S.C. Section 1415(e)(2) (authorizing court to 'grant such relief as the court determines is appropriate'); *School Committee of Town of Burlington, Mass. v. Department of Educ. of Mass.*, 471 U.S. 359, 369-70, 105 S.Ct. 1996, 2002-03, 85 L.Ed.2d 385 (1985)" (at 782)

Angela L. v. Pasedena, 918 F.2d 1188, 1193 (1990)

Seventh Circuit –

Marie O. v. Edgar, 131 F.3d 610, 622 (1997)

Mallett v. Wis. Div. of Vocational Rehabilitation, 130 F.3d 1245 (1997) –

> "We fail to locate any congressional intention to foreclose a Section 1983 remedy for the enforcement of Title I for three reasons. First, the presence of administrative channels for a beneficiary to dispute the content on an IWRP does not preclude judicial review under Section 1983. . . . Second, the existence of a judicial remedy does not foreclose the availability of a Section 1983 remedy. . . . Finally, unlike the statutes in *Sea Clammers* and *Smith v. Robinson*, the only discernable congressional intent in the Rehabilitation Act is not to supplant the Section 1983 remedy. . . . Thus,

Mallet may challenge whether DVR's policy disfavoring funding graduate school education violates his right to an IWRP under Section 1983." (at 1256-57)

Eighth Circuit –

Digre v. Roseville Schools Ind. D., 841 F.2d 245 (1988)

"On appeal from the district court's denial of her motion, Mrs. Digre argues that the court erred in concluding that a 42 USC Section 1983 action is not available to remedy violations of the EHA or the due process clause of the fourteenth amendment. We agree. A section 1983 action lies when a defendant acting under color of state law violates a right secured by the Constitution or federal law." (at 249)

Nor is there any indication that Congress has changed its mind in the eighteen years since 1986. The IDEA legislation was signed into law on December 3, 2004, and there is not indication to the Plaintiff that Congress did not intend Section 1415(l) to apply to this matter.

Ninth Circuit –

Even as Congress acted in 1986 to make it abundantly clear that its intent was to allow employment of Section 1983 in the protection of the disabled, **Doe by Gonzales v. Maher**, 793 F.2d 1470 (1986), made no mention of the legality of a Section 1983 action. However, in the only three district court decisions of which Plaintiff is aware in the 9th Circuit [**Emma C. v. Eastin**, 985 F.Supp. 940 (N.D. Cal. 1997), **Goleta Union Elementary School Dist. v. Ordway**, 166 F. Supp. 2d 1287 (C.D. Cal. 2001), and **Roe Ex Rel. Preschooler II v. Nevada**, 332 F. Supp. 2d 1331 (D. Nev. 2004)] , they found that:

"A split currently exists among the federal circuits whether a statutory violation of the IDEA creates a sufficient basis to anchor a claim under section 1983. The Ninth Circuit has yet to decide this issue, however, Defendants content that

the circuits whose reasoning prohibits section 1983 claims based on IDEA comport with the Ninth Circuit's holdings regarding section 1983 in general. Additionally, Defendants argue that the logic and reasoning of the courts prohibiting section 1983 based on IDEA is sound and persuasive.

"The Court disagrees and is persuaded by the reasoning of the Central and Northern Districts of California that Congress expressly authorized section 1983 suits to vindicate violations of IDEA-protected rights. *See Emma C.* . . . see also *Goletta* . . . ." (**Roe Ex Rel. Preschooler II v. Nevada**, page 1342)

CONGRESSIONAL INTENT – AS ILLUSTRATED IN 2004

In his speech on the floor of the Senate on November 19, 2004, (Congressional Record, page S11547) in support of the IDEA of 2004, Senator Tom Harkin of Iowa made reference to a Government Accountability Office (GAO) Report prepared at the request of Senator Edward Kennedy of Massachusetts, and entitled *Special Education: Improved Timeliness and Better Use of Enforcement Actions Could Strengthen Education's Monitoring System.* The basis of the Report is that the United States Department of Education from 1997 to 2003 visited 31 states and did analysis of violations of the IDEA. All but one state evidenced an average of eight major violations, with the majority being for failure to provide actual services to children. Kentucky was not one of the 31 states, but with 11 of the 30 states, had "Special conditions" imposed on it by the U.S. Department of Education (DOE) because of "Participation and reporting on alternate assessments," and such "Special conditions" are not yet resolved against the State of Kentucky. (page 32 of the Report)

Senator Harkin then stated:

"As part of the enforcement of this law, States must ensure that local education agencies are meeting their targets to provide a free, appropriate public education. If they fail to

do so, the State must take action, including prohibiting the flexible use of any of the local education agency's resources."

In its Report to Senator Kennedy dated September 9, 2004, the GAO specified:

"As a condition of receiving IDEA funding, states agree to comply with certain requirements regarding the educational and related services provided to disabled children. These requirements include the development of an individualized education program (IEP) that outlines the specific services to be provided to each student based on individual needs. For students over the age of 14, IEPs must include a statement of transition services to be provided to students to help them obtain the educational and vocational skills needed to improve the likelihood of self-sufficiency once they leave school." (page 1)

It is particularly such transition services that Plaintiff seeks, and part of which the Court has already ordered.

The GAO Report continues:

"When IDEA was reauthorized in 1997, Congress placed new emphasis on state and local accountability for complying with IDEA and improving educational outcomes, such as graduation and other measures of postsecondary success, for such disabled students. The reauthorized law made each state's annual federal funds conditional on its success in providing a free appropriate public education in the least restrictive environment." (page 1)

* * * *

"In the event of noncompliance, education (U.S. DOE) has the specific authority to employ six sanctions: (1) imposing restrictions or "special conditions" on a state's IDEA grant award; (2) negotiating a long-term compliance agreement with a state requiring corrective actin within 3 years; (3) disapproving a state's application for funds when the

application does not meet IDEA eligibility requirements; (4) obtaining a 'cease and desist' order to a state to discontinue a practice or policy that violates IDEA; (5) withholding IDEA funds in whole or in part depending on the degree of the state's noncompliance; and (6) referring a noncompliant state to the Department of Justice for appropriate enforcement action." (page 7)

* * * *

"Although corrective action plans have a 1-year timeframe for completion according to Education policy, our analysis showed that most cases of noncompliance addressed through this method remained open for years. We found that only 7 of 30 states with finding of noncompliance visited from 1997-2002 had completely resolved their deficiencies as of May 2004. Closure of these cases, that is resolution of all deficiencies, took from 2 to 7 years from the time the deficiencies were first identified during a monitoring visit. Of the remaining 23 cases, about half have been unresolved for 5-7 years." (page 17)

Debate in Congress that year was consistent in relation to the intent of the IDEA, and of the problems of delays and derelictions by local and state educational entities.

Senator Kennedy of Massachusetts reassured the Senate that complaints of "costly litigation" should be assuaged by the legislation's implementation of the standards of **Christiansburg Garment Co. v. EEOC,** 434 U.S. 412 (1978) which would punish spurious litigants. (Cong. Rec., November, 19, 2004, pages S11543-11548)

Mr. Gregg of New Hampshire stated:

"We have developed a whole series of initiatives to try to, for better or worse, create dispute resolution in a more comfortable manner rather than a confrontational and litigious manner." (Cong. Rec., May 13, 2004, page S5405)

Senator Kennedy referred to:

"Reports from the Department of Education (which) show just how rampant non-compliance with the IDEA is. From 2000 to 2003: 76 percent of States did not appropriately resolve complaints: . . . and 65 percent of states did not appropriately prepare students for post-school employment and independent living."

And finally, from the Congressional Record of November 17, 2004, page H9948: "Strike (G) and insert the following: '(G) Rule of construction. --- Nothing in this section shall be construed to affect the right of a parent to file a complaint with the State educational agency, if such agency offers and conducts appeals."

ARGUMENT ON THE LEGALITY OF THE COMPLAINT PROCESS

Statutory and Regulatory Background

In 1975, finding that more than half of the nation's eight million children with disabilities were not receiving appropriate educational services, Congress appropriated federal funds for state special education programs and made them available on the condition that states implemented policies assuring a "free appropriate public education," sometimes referred to as "FAPE," all children with disabilities. Known then as the Education of All Handicapped Children Act ("EHA"), and today named as the Individuals with Disabilities Education Act ("IDEA"), the law "confers upon disabled students an enforceable substantive right to public education in participating States, and conditions federal financial assistance upon a State's compliance with the substantive and procedural goals of the Act." [See: **Honig v. Doe**, 484 U.S. 305, 310, 108 S.Ct. 592, 98 L.Ed 2d 686 (1988); also, **Bd. of Educ. v. Rowley**, 458 U.S. 176, 188-89, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982)] holding that the EHA established right to public education for students with disabilities that "consist of education instruction specially designed to meet the unique needs of the handicapped

Mrs. W. v. Tirozzi, 832 F.2d 748 (2nd Cir. 1987) – " Exhaustion is not an inflexible rule." (page 756)

From 1985 House of Representatives Report No. 296, 99th Cong., 1st Sess. 4 (1985): Situations where administrative exhaustion would be futile or inadequate include complaints that:

> "1) it would be futile to use the due process procedures . . . ; 2) an agency has adopted a policy or pursued a practice of general applicability that is contrary to the law; 3) it is improbable that adequate relief can be obtained by pursuing administrative remedies (e.g., the hearing officer lacks the authority to grant the relief sought) . . . . " (See: **Mrs. W. v. Tirozzi**, page 756)

1992 – **Cordero by Bates v. Pennsylvania Dept. of Educ.**, 795 F.Supp. 1352 (M.D.Pa.)

- "A state must, moreover, ensure through oversight that state and local agencies, including school districts, fulfill the dictates of the Act. . . . If local districts are failing to fulfill their mandates under the IDEA and state law, the state is required to step in and provide such assistance directly." (at 1360) . . . . The violation of even one child's rights under the Act is sufficient to visit liability on the state." (at 1363)

Courts universally recognized that parents need not exhaust the procedures set forth in 20 U.S.C. Section 1415 where resort to the administrative process would be either futile or inadequate. Excusing exhaustion in cases of futility and inadequacy is based both on general exhaustion principles [See: Jacob Stein, Glenn Mitchell & Basil Mezines, Administrative Law, Section 49.02 (1992)], and on the legislative history of the IDEA. In addition to these two exceptions, the legislative history notes a third exception:

> "[T]here are certain situations in which it is not appropriate to require the use of due process and review procedures set out in [20 U.S.C. Section 1415(b) and (c) of the [IDEA] before filing a law suit.

These include complaints that: (1) it would be futile to use the due process procedures . . .; (2) *an agency has adopted a policy or pursued a practice of general applicability that is contrary to the law*; (3) it is improbable that adequate relief can be obtained by pursuing administrative remedies (e.g., the hearing officer lacks the authority to grant the relief sought. . . ."

H.R.Rep. No. 296, 99th Cong., 1st Sess. 7 (1985)(emphasis added)."(at 1303-4)

1982 – **Patsy v. Board of Regents of State of Fla.**, 457 U.S. 496 – ". . .(W)e believe that the tenor of the debates over section 1 supports our conclusion that exhaustion of administrative remedies in Section 1983 action should not be judicially imposed." (at 502)

The IDEA creates a "right, enforceable in federal court, to the free appropriate public education required by the statute." [See: **Smith v. Robinson**, 468 U.S. 992, 1002 n. 6, 104 S. Ct. 3457, 82 L.Ed 2d 746 (1984), *superseded by statute on other grounds by* Pub. L. No. 99-372, 100 Stat. 796 (1986)]. Before bringing a suit based on a violation of this right, a complainant must normally exhaust the due process hearing procedures required by 20 U.S.C. Section 1415. The IDEA's exhaustion requirement applies to suits under "other Federal laws protecting the rights of children with disabilities . . . seeking relief that is also available under" the IDEA [See: 20 U.S.C. Section 1415(l) The exhaustion requirement is not, however, a rigid one. [See: **Hoeft v. Tuscon Unified Sch. Dist.**, 967 F.2d 1298, at 1302-03 (9th Cir. 1992)] courts universally recognize that parents need not exhaust the procedures set forth in 20 U.S.C. Section 1415 where resort to the administrative process would be either futile or inadequate." (at 1303)

There should be no dispute that the IDEA requires the implementation of the final decision of KDE complaint procedure. [See: **Robinson v. Pinderhughes**, 810 F.2d 1270, 1274 (4th Cir. 1987), holding that the IDEA's procedural requirements "can only be fairly construed to contemplate that once a final favorable

administrative decision has been gained by the plaintiff, the State will carry out that decision although it may have opposed the position of the plaintiff in the administrative proceedings." Also see: **Jeremy H. v. Mount Lebanon Sch. Dist.**, 95 F.3d 272, 2679 n. 13 (3rd Cir. 1996): "[I]t [would] be curious for Congress to have established section 1415's detailed procedural apparatus solely in order to generate advisory opinions."]

Like under the APA or the CRIPA, the IDEA's exhaustion scheme was carefully designed to balance the individual complainant's interest in retaining prompt access to a judicial forum and the countervailing institutional interests favoring exhaustion. [See: **Hoeft**, at 1303, discussing policies served by the

IDEA EXHAUSTION REQUIREMENT

Because the CRP "is a creature of the (Department's) own regulations, (its) interpretation of it is, under our jurisprudence, controlling unless 'plainly erroneous or inconsistent with the regulation." [See: **Auer v. Robbins**, 519 U.S. 452, 461, 117 S.Ct. 905, 137 L.Ed. 2d 79 (1997)] According to the Department of Education, the CRP is intended to "allow (parents and school districts) to resolve differences without resort to more costly and litigious resolution through due process," not to create a mechanism that must be exhausted in addition to the due process system. [See: Assistance to States for the Education of Children with Disabilities, 64 Fed Reg. 12,406, 12,646 (March 12, 1999); and also, Office of Special Education Programs Memorandum 00-20 (July 17, 2000), describing CRP regulations as an attempt to provide "a less costly and more efficient mechanism for resolving disputes than the impartial due process hearing system"

Hoeft states that on a case by case basis, district courts may choose to require or to accept exhaustion of the CRP "as a substitute for exhausting IDEA procedures in challenges to facially invalid policies." (at 1308) "(A)dministrative exhaustion may be necessary to give the state a reasonable opportunity to investigate and correct such policies." (*Id.*) In accord with this rationale, the

court suggested that the filing of a CRP complaint may be sufficient to meet the exhaustion requirement "where the only purposes served by exhaustion are to notify the state of local noncompliance and to afford it an opportunity to correct the problem." (at 1308)

The statement in **Hoeft** that the CRP may serve as a substitute for due process system exhaustion is consistent with the traditional exception to exhaustion requirements based on futility in inadequacy. [See: **Honig**, at 327] Where the challenge is to a facially invalid policy, and the state refuses to alter the policy after a CRP complaint, then further exhaustion may be excused because "the administrative body is shown to be biased or has otherwise predetermined the issue before it." [See: **McCarthy v. Madigan**, 503 U.S. 1081 (1992)] Exhaustion for a CRP may also render the due process hearing futile where all the educational issues were resolved, leaving only issues for which there is no adequate administrative remedy. [See: **Witte v. Clark County Sch. Dist.**, 197 F.3d 1271, 1275-76 (9th Cir. 1999)]

Also, the Office of Special Education of the U.S. Department of Education, in its Programs Memorandum 94-16, 21 Disab. Educ. L. Rep. 85 (March 22, 1994), describes the CRP regulations as establishing a process that may be used "in lieu of the due process hearing system."

If Plaintiff is required by the IDEA to, thirteen years after she entered Dawson Springs schools, to initiate a due process hearing to verify what the KDE has already found to be true, it would be futile, and a travesty.

Conclusion

Plaintiff has carefully and meticulously considered the Court's dismissal of her complaint, and found that there is no legal justification for either its refusal to apply the principle of *res judicata* to the claims of Dawson Springs and KDE, nor to admit the overwhelmingly prevalence of Section 1983 damage rights for Plaintiff. It should distinguish the holding in **Crocker** as not being based on the intent of Congress.

Likewise, the District Court's refusal to grant jurisdiction because Plaintiff has not exhausted its due process hearing rights does not preclude the use of complaint procedure rights.

The petition for writ of certiorari should be granted

Respectfully submitted,

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APPENDICES

A – Decision of the Sixth Circuit Court of Appeals

B – Decision on Request for Rehearing by the Sixth Circuit Court of Appeals

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Statutes

STATUTES AT ISSUE IN THE PETITION FOR CERTIORARI

Title 42 – The Public Health and Welfare

Section 1983 - Civil action for deprivation of rights

Every person who, under color of an statue, ordinance, regulation, custom, or usage, of an State or Territory of the District of Columbia, subjects, or causes to be subjected, and citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory degree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Title 20 – Education

Section 1415 – Procedural safeguards

(a) Establishment of procedures. Any State educational agency, State agency, or local education agency that receives assistance under this part [20 USC Sections 1411 et seq.] shall establish and maintain procedures in accordance with this section to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies.

(b) Type of procedures. The procedures required by this section shall include---

(1) an opportunity for the parents of a child with disability to examine all records relating to such child and to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child;
(2) procedures to protect the rights of the child whenever the parents of the child are not known, the agency cannot, after reasonable efforts, locate the parents, or the child is a ward of the State, including the assignment of an individual (who shall not be an employee of the State educational agency, the local educational agency, or any other agency that is involved in the education or care of the child) to act as a surrogate for the parents;
(3) written prior notice to the parents of the child whenever such agency ---
    (A) proposes to initiate or change; or
    (B) refuses to initiate or change;
    the identification, evaluation, or educational placement of the child, in accordance with subsection (c), or the provision of a free appropriate public education to the child;
(4) procedures designed to ensure that the notice required by paragraph (3) is in the native language of the parents, unless it clearly is not feasible to do so;
(5) an opportunity for mediation in accordance with subsection (e);
(6) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child;
(7) procedures that require the parent of a child with a disability, or the attorney representing the child, to provide notice (which shall remain confidential)---
    (A) to the State educational agency or local educational agency, as the case may be, in the complaint filed under paragraph (6); and
    (B) that shall include---

(i) the name of the child, the address of the residence of the child, and the name of the school the child is attending;

(ii) a description of the nature of the problem of the child relating to such proposed initiation or change, including facts relating to such problem; and

(iii) a proposed resolution of the problem to the extent known and available to the parents at the time, and

(8) procedures that require the State educational agency to develop a model form to assist parents in filing a complaint in accordance with paragraph (7).

(c) Content of prior written notice. The notice required by subsection (b)(3) shall include---

(1) a description of the action proposed or refused by the agency;

(2) a explanation of why the agency proposes or refuses to take the action;

(3) a description of any other options that the agency considered and the reasons why those options were rejected;

(4) a description of each evaluation procedure, test, record, or report the agency used as a basis for the proposed or refused actions;

(5) a description of any other factors that are relevant to the agency's proposal or refusal;

(6) a statement that the parents of a child with a disability have protection under the procedural safeguards of this part [20 USC Sections 1411 et seq.] and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained; and

(7) sources for parents to contact to obtain assistance in understanding the provisions of this part [20 USC Sections 1411 et seq.].

(d) Procedural safeguards notice. (1) In general. A copy of the procedural safeguards available to the parents of a child with a disability shall be given to the parents, at a minimum---

(A) upon initial referral for evaluation;

(B) upon each notification of an individualized education program meeting and upon reevaluation of the child; and

(C) upon registration of a complaint under subsection (b)(6).

(2) Contents. The procedural safeguards notice shall include a full explanation of the procedural safeguards, written in the native language of the parents, unless it clearly is not feasible to do so, and written and under regulations promulgated by the Secretary relating to—

(A) independent educational evaluation;

(B) prior written notice;

(C) parental consent;

(D) access to educational records;

(E) opportunity to present complaints;

(F) the child's placement during pendency of due process proceedings;

(G) procedures for students who are subject to placement in an interim alternative educational setting;

(H) requirements for unilateral placement by parents of children in private schools at public expense;

(I) mediation;

(J) due process hearings, including requirements for disclosure of evaluation results and recommendations;

(K) State-level appeals (if applicable in that state);

(L) Civil actions; and

(M) Attorneys' fees.

(e) Mediation. (1) In general. Any State educational agency or local educational agency that receives assistance under this part [20 USC Sections 1311 et seq.] shall ensure that procedures are established and implemented to allow parties to disputes involving any matter described in subsection (b)(6) to resolve such disputes through a mediation process which, at a

minimum, shall be available whenever a hearing is requested under subsection (f) or (k)

(2) Requirements. Such procedures shall meet the following requirements:

(A) The procedures shall ensure that the mediation process—

(i) is voluntary on the part of the parties;

(ii) is not used to deny or delay a parent's right to a due process hearing under subsection (f), or to deny any other rights afforded under this part [20 USC Sections 1411 et seq.]; and

(iii) is conducted by a qualified and impartial mediator who is trained in effective mediation techniques.

(B) A local educational agency or a State agency may establish procedures to require parents who choose not to used the mediation process to meet, at a time and location convenient to the parents, with a disinterested party who is under contract with---

(i) a parent training and information center or community parent resource center in the State established under section 682 or 683 [20 USC Sections 1482 or 1483]; or

(ii) an appropriate alternative dispute resolution entity;

to encourage the sue, and explain the benefits of the mediation process to the parents.

(C) The State shall maintain a list of individuals who are qualified mediators and knowledgeable in laws and regulations relating to the provision of special education and related services.

(D) The State shall bear the cost of the mediation process, including the costs of meetings described in subparagraph (B).

(E) Each session in the mediation process shall be scheduled in a timely manner and shall be held in a location that is convenient to the parties to the dispute.

(F) An agreement reached by the parties to the dispute in the mediation process shall be set forth in a written mediation agreement.

(G) Discussions that occur during the mediation process shall be confidential and may not be used as evidence in any subsequent due process hearing or civil proceedings and the parties to the mediation process may be required to sign a confidentiality pledge prior to the commencement of such process.

(f) Impartial due process hearing. (1) In general. Whenever a complaint has been received under subsection (b)(6) or (k) of this section, the parents involved in such complaint shall have an opportunity for an impartial due process hearing, which shall be conducted by the State educational agency or by the local educational agency, as determined by State law or by the State educational agency.

(2) Disclosure of evaluations and recommendations. (A) In general. At least 5 business days prior to a hearing conducted pursuant to paragraph (1), each party shall disclose to all other parties all evaluations completed by that date and recommendations based on the offering party's evaluations that the party intends to sue at the hearing.

(C) Failure to disclose. A hearing officer may bar any party that fails to comply with subparagraph (A) from introducing the relevant evaluation or recommendation at the hearing without the consent of the other party.

(3) Limitation on conduct of hearing. A hearing conducted pursuant to paragraph (1) may not be conducted by an employee of the State educational agency or the local educational agency involved in the education or care of the child.

(g) Appeal. If the hearing required by subsection (f) is conducted by a local educational agency, any party aggrieved by the findings and decision rendered in such a hearing may appeal such findings and decision to the State educational agency. Such agency shall conduct an impartial review of such decision.

The officer conducting such review shall make an independent decision upon completion of such review.

(h) Safeguards. Any party to a hearing conducted pursuant to subsection (f) or (k), or an appeal conducted pursuant to subsection (g), shall be accorded---

(1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities;

(2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses;

(3) the right to a written or, at the option of the parents, electronic verbatim record of such hearing; and

(4) the right to written, or, at the option of the parents, electronic findings of fact and decisions (which findings and decisions shall be made available to the public consistent with the requirements of section 617(c).

(i) Administrative procedures. (1) In general. (A) Decision made in hearing. A decision made in a hearing conducted pursuant to subsection (f) or (k) shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (g) and paragraph (2) of this subsection.

(2) Right to bring civil action. (A) In general. Any party aggrieved by the findings and decision made under subsection (f) or (k) who does not have the right to an appeal under subsection (g), and any party aggrieved by the findings and decision, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy.

(B) Additional requirements. In any action brought under this paragraph, the court---

(i) shall receive the records of the administrative proceedings;

(iii) shall hear additional evidence at the request of a party; and

(iv) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

(3) Jurisdiction of district courts; attorneys' fees. (A) In general. The district courts of the United States shall have jurisdiction of actions brought under this section without regard to the amount in controversy.

(B) Award of attorneys' fees. In any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents of a child with disability who is the prevailing party.

(C) Determination of amount of attorneys' fees. Fees awarded under this paragraph shall be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished. No bonus or multiplier may be sued in calculating the fees awarded under this subsection.

(D) Prohibition of attorneys' fees and related costs for certain services.

(i) Attorneys' fees may not be awarded and related costs may not be reimbursed in any action or proceeding under this section for services performed subsequent to the time of a written offer of settlement to a parent if---

(I) the offer is made within the time prescribed by Rule 86 of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, at any time more than 10 days before the proceeding begins;

(II) the offer is not accepted within 10 days; and

(III) the court or administrative hearing officer finds that the relief finally obtained by the parents is not more favorable to the parents than the offer of settlement.

(ii) Attorneys' fees may not be awarded relating to any meeting of the IEP team unless such meeting is convened as a result of an administrative proceeding or judicial action, or, at the discretion of the State, for a mediation described in subsection (e) that is conducted prior to the filing of a complaint under subsection (b)(6) or (k) of this section.

(E) Exception to prohibition on attorneys' fees and related costs. Notwithstanding subparagraph (D), an award of attorneys' fees and related costs may be made to a parent who is the prevailing party and who was substantially justified in rejecting the settlement offer.

(F)Reduction in amount of attorneys' fees. Except as provided in subparagraph (G), whenever the court finds that---

(i)the parent, during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy;

(ii) the amount of the attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, reputation, and experience;

(iii)the time spend and legal services furnished were excessive considering the nature of the action or proceeding; or

(iv)the attorney representing the parent did not provide to the school district the appropriate information in the due process complaint in accordance with subsection (b)(7);

the court shall reduce, accordingly, the amount of the attorneys' fees awarded under this section.

(H) Exception to reduction in amount of attorneys' fees. The provisions of subparagraph (F) shall not apply in

any action or proceeding if the court finds that the State or local educational agency unreasonably protracted the final resolution of the action or proceeding or there was a violation of this section.

(j)Maintenance of current educational placement. Except as provided in subsection (k)(7), during the pendency of any proceedings conducted pursuant to this section. Unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed.

Supreme Court, U.S.
FILED
07-1 FEB 12 2007
OFFICE OF THE CLERK

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

HOLLY LONG,
Petitioner

Vs.

DAWSON SPRINGS INDEPENDENT SCHOOL DISTRICT, DAVID BOGGS, COMMONWEALTH OF KENTUCKY, and STATE DEPARTMENT OF EDUCATION,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Appendices for

PETITION FOR WRIT OF CERTIORARI

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APPENDICES

A – Decision of the Sixth Circuit Court of Appeals

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Statutes

APPENDIX A

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 05-5535

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

AUG 25 2006

LEONARD GREEN, Clerk

HOLLY LONG, Plaintiff-Appellant v. DAWSON SPRINGS INDEPENDENT SCHOOL DISTRICT, DAVID BOGGS, COMMONWEALTH OF KENTUCKY, & STATE DEPARTMENT OF EDUCATION, Defendants-Appellees.	) ON APPEAL FROM) THE UNITED) STATES DISTRICT) COURT FOR THE) WESTERN DIS-) TRICT OF) KENTUCKY

Before: BOGGS, Chief Judge; SUTTON, Circuit Judge; and HOOD, District Judge.

PER CURIAM. Plaintiff Holly Long, who as a student in the mid-1990s was denied adequate special educational services by the Dawson Springs School District, appeals the district court's dismissal with prejudice of her claims, under 42 U.S.C. Section 1983 and the Individuals with Disabilities Act (IDEA), 20 U.S. C. Section 1400 *et seq*. We affirm the ruling of the district court.

1 The Honorable Denise Page Hood, United States District Judge for the Eastern District of Michigan

Plaintiff Holly Long is learning impaired. It is agreed by all parties that she qualifies as a special education student under the IDEA. She enrolled in January 1992, in the Dawson Springs School system in Hopkins County, Kentucky. She was fourteen. Her family became dissatisfied with her education. On September 29, 1994, they sought a due process hearing pursuant to 20 U.S.C. Section 1415(f), as implemented in 707 KAR 1:340, Sections 5-8, on the theory that Dawson Springs was not in compliance with its requirements under the IDEA. Long's family claimed, *inter alia*, that the school district had not implemented her individualized education program ("IEP"). The Department of Education appointed a hearing officer and scheduled a hearing for November 15, 1994. The Long family requested that the hearing be cancelled. The Department then dismissed the due process proceeding, and the Longs never asked that it be reopened.

Holly Long withdrew from the Dawson Springs Schools on December 7, 1994. Her family moved to Oldham County, where she enrolled in the public schools. She finished her twelfth year of education in 1998.

Her family filed a complaint on May 27, 1998, under the Department of Education's complaint resolution procedures authorized in Kentucky by KAR 1:340 Section 15 (the complaint resolution procedure, of "CRP"). The CRP is an alternative approach to a due process hearing. The Long family's complaint sought further educational services for Holly Long. It alleged that Dawson springs failed to implement her IEP between August 1991 and December 1994. The Department investigated and issued eight findings on September 2, 1998. Those findings were, in summary:

1) Dawson Springs did approve policies for the implementation of Holly Long's IEP. But it did not implement the IEP in timely fashion. "Therefore, Dawson Springs failed to provide a free and appropriate education to Plaintiff."

2) The school districct had placed Holly Long in the "least restricted environment . . . and offered placement alternatives to the parent."
3) The school district "did not provide post-secondary transition planning for Plaintiff."
4) The school district "did not implement a system to monitor, collect and report progress data for any of the short-term instructional objectives set out in the IEP's from 1991 through 1994." Nor did it "ensure implementation of any IEP's as written during that period."
5) Dawson Springs did furnish a computer and printer for use by Holly Long at school, "evaluated [her]for assistive technology devices[,] and offered to provide the recommended assistive technology."
6) The school district "failed to provide a comprehensive framework or multi-year course of study, failed to determine whether Plaintiff was eligible for a diploma or certificate of completion, and failed to provide a graduation plan."
7) "Dawson Springs did not make an extended year program available and did not determine whether Plaintiff needed extended school year services."
8) "Plaintiff is entitled to compensatory services for the time she was denied a FAPE [free and appropriate public education}, which was approximately three years. Dawson Springs was required to convene an ARC meeting" [Admissions and Release Committee, discussed in 707 KAR 1:280]," which is charged with "developing, reviewing, or revising an additional education program (IEP) for a child with a disability." The school district was obligated to convene the ARC "as soon as it can be conveniently arranged, to discuss compensatory services for the time period Plaintiff was denied FAPE. Dawson Springs was required to submit documentation of this ARC meeting to the Division of

Exceptional Children Services within ten days of the meeting."

Long did not appeal or seek review of the Department's conclusions, though she had the option to seek further review from the United States Department of Education under 34 C.F.R. Section 300.661(d) (repealed in 1999). However, Dawson Springs does appear to have sought reconsideration of the Kentucky Department's findings. It is unclear what procedural basis the school district relied upon for this petition for reconsideration, but the further review did take place. The Department of Education issued a further opinion on the matter more than a year after its first one. The Department affirmed seven of the eight findings on September 28, 1999. However, with respect to number six, the Department wrote:

"The September 2, 1998, report of findings determined the student was not provided FAPE during the period investigated. Therefore, the student is entitled to compensation for educational services not provided. The corrective action plan ("CAP") requires the district to convene an ARC meeting with the student to determine how, when, where and in what form the services will be provided. The district must submit to this office copies of the ARC meeting invitations as well as conference summary reports which describe the results of an ARC meetings held with the emancipated student by November 30, 1999."

In other words, the Department ordered that further documentation be provided before it could reach any ultimate conclusion on at least this portion of its decision.

Following the order of September, 1999, Dawson Springs scheduled an ARC meeting. The Long family requested that a Department representative attend. The family asked also that the meeting be held in Frankfurt. The Department declined to send a representative, noting it had no role to play in the ARC. The Long family expressed and exhibited unwillingness to meet with the

school district's officials in the absence of a Departmental representative, the Longs and the school district entered into a relatively involved correspondence. In the course of that correspondence, Dawson Springs agreed to pay for two months of evaluative services by an organization called Career Services, Inc., which appears to be a general purpose employment opportunity entity. One of the services it provides is training assistance (chiefly employment training, apparently) to persons with special educational needs. The Long family indicated a desire to work with Career Services, and Dawson Springs offered to pay for two months of the company's time.

Dawson Springs sent Career Services a series of inquiries seeking information about Holly Long's education needs. After some delays, Career Visions answered the school district questions, but it is unclear whether Career Visions transmitted a full and satisfactory version of its answers to the school district. The reason for this confusion is that, as noted infra, a later meeting between the parties produced a set of terms, including the condition that Career Visions furnish the school district with answers to all of its questions. Dawson Springs scheduled and ARC. However, it appears that Dawson Springs had trouble reaching the Long family by telephone. This caused further delay. Then Holly Long's attorney resigned from the case. More delay ensued. David Boggs, Superintendent of the school district, sent a letter directly to the Long family on July 13, 2000, proposing settlement terms:

"Compensatory education through a written contract for computer education training with a company like Career Visions for up to a maximum of 104 weeks beginning July 1, 2000, consisting of two sessions for one and a half hours per session at a maximum of $75 per hour for training, $30 per hour for travel time and 31 cents per mile for travel to sessions."

Long's new lawyer declined these terms. The lawyer emphasized that the Department's findings obligated the school district to furnish education for the same amount of time a FAPE had been withheld. The parties disagreed, at this moment and

throughout the litigation, on the length and nature of education time owed Long. Long enrolled in the school district on January 28, 1992. She departed December 7, 1994. After vacation time is deducted, that translates to roughly 100 weeks of school time, which comports with Dawson Spring's calculation that it owes 104 weeks of school time. By contrast, Long asserted that she was owed three and a half years of education.

The school district then scheduled another ARC. Both parties appeared at this ARC on September 20, 2000. They agreed that: 1) Career Visions would furnish Dawson Springs with complete answers to its questions, and 2) the school district would provide Long with the use of a computer. However, they continued to disagree as to the amount of education time the district owed Long.

Through counsel, the Long family wrote to the Department of Education on November 30, 2000, complaining about delays and the school district's offer. The Department reviewed the most recent proceedings and concluded that Dawson Springs, by and through holding the ARC meetings and making its offer to the Long family, had discharged its obligations under the departmental order of September 2, 1998. The Department's letter then noted that the Long parents could seek further recourse by following the complaint resolution or due process hearing procedures provided by 707 KAR 1:340, Sections 5-8 and 34 C.F.R. Part 300.506-10. The letter concluded "[a}s you are aware, these procedures have to be exhausted prior to filing any type of civil action."

Long's lawyer replied by arguing that it was the Department's responsibility to take corrective steps in the case. In response, the Department issued a letter on February 8, 2001, stating that it considered the matter closed and informing the Long family again that it could seek a due process hearing.

The Long family and Dawson Springs met again on May 22, 2001, to discuss settlement terms. They did not reach an agreement.

Long filed suit giving rise to our case on June 28, 2001. The next week, Dawson Springs asked Career Visions to provide services to Long under the terms of the November 17, 2000 ARC

action plan. Career Visions replied by informing the school district that the Longs had declined to accept the services at that time.

The school district moved on September 14, 2001, to dismiss the complaint. The Department entered a similar motion on February 11, 2002.

The district court examined the case and determined that ill will between the parties had gotten in the way of successful resolution that would actually assist in the plaintiff's education. The court held a telephonic conference among the parties on May 21, 2002. On that call, the parties agreed to circulate the names of three professionals who would evaluate Holly Long. Observing the parties' good faith efforts, the district court denied without prejudice the parties' pending dispositive motion on July 26, 2002.

The parties eventually agreed that a professional named De. Deborah Bauder would be selected to recommend a program of services tailored to Long's needs. However, when Bauder sought to examine Long, her lawyer objected, stating that there was no need for further evaluation of the plaintiff. On May 9, 2003, the court held a further conference. The parties finally agreed on a program of services and assessments that would last up to three years. The court issued an order reflecting that agreement on May 20, 2003. At oral argument, it was agreed that three years of services had been furnished to Holly by May 2006.

Thereafter, Dawson Springs reimbursed Career Visions and related professionals who furnished the services to Holly Long. After some time, the court reviewed the services provided by Career Visions, as well as their progress report on the plaintiff. In an order of June 29, 2004, the court concluded that the delivery of the services was satisfactory and that the "promise of continuing those services could resolve all the disputes at issue."

Around this time, Career Visions suggested that Long's educational services be expanded to eight hours per week. The court adopted this recommendation on August 10, 2004. The court also asked the parties to resubmit their dispositive motions it had earlier denied. They did so.

On December 20, 2004, the court issued a memorandum opinion and order on the dispositive motions. The court considered

Long's claim under the IDEA. The court noted that the plaintiff complained of two things: 1) the delay in providing her with compensatory education between September 28, 1999, and June 1, 2003 (the period between the Department's order following reconsideration and the district court's final order on furnishing the services), for which they sought compensatory money damages under the IDEA; and 2) the denial of her education between 1992 and 1994, for which they did not seek money damages. The court ruled temporarily that Long had no legal basis for her claim for monetary damages. It ruled further that there was no federal jurisdiction to hear Long's apparent appeal from the Department of Education's disposition in the CRP, because Long had never exhausted her administrative remedies under IDEA's provision for a due process hearing, which was the only administrative procedure for the assertion of federal jurisdiction under all relevant statutes and regulations. The court dismissed Long's IDEA and Section 1983 claims with prejudice. The district court also ruled that, "so long as Dawson Springs continues to pay for the current level of education services provided by Career Visions (including transportation), it is in compliance with the Department of Education's final order dated September 28, 1999." This portion of the district court's opinion may be viewed as both an expression of good will and gratuitous, as the court correctly disposed of the case on the grounds of exhaustion.

On February 4, 2005, the court made these orders final. They are now appealed.

II

The IDEA requires that school districts receiving federal funding provide a "free and appropriate public education"("FAPE" to all special education students. 20 U.S.C. Section 1412; Bd. of Ed. of Hendrick Hudson Central Sch. Dist., Westchester Cty., v. Rowley, 458 U.S. 176, 179 (1982). The IDEA establishes procedures by which school officials, parents, and the student can collaborate to create an IEP. 20 U.S.C. Section 1401(11), 1414(d); Sch. Comm. of Town of Burlington, Mass. v. Dep't of Educ. of Mass., 471 U.S. 359, 368 (1985). The IDEA also provides for administrative procedures to resolve disputes when the people

involved in the creation of an IEP are notable to agree on its substance. 20 U.S.C. Section 14125(b).

It is clear that the IDEA authorizes the award of funds to parents to reimburse them for expenses on special education that a school board should have, but did not, provide. Town of Burlington, 471 U.S. at 369-70. However, in Town of Burlington, the Supreme Court appeared to suggest that money awards under the IDEA should not be made as "damages." Our court read this case as holding that money damages are not available as a remedy for violations of IDEA. Crocker v. Tennessee Secondary school Athletic Ass'n, 980 F.2d 382, 386 (6th Cir. 1992) Throughout this litigation, Long has criticized the Crocker decision in this particular. The Crocker holding is consistent with the view of other circuits on this question, however. See Mata Diaz-Fonseca v. Commonwealth of Puerto Rico, 451 F.3d 13 (1st Cir. 2006); Nieves-Marquez v. Puerto Rico, 353 F.3d 108, 124 (1st Cir. 2003); Polera v. Bd. of Educ., 288 F.3d 478, 485-86 (2d Cir. 2002); Sellers v. Sch. Bd. of Manassas, Va., 141 F.3d 524, 527 (4th Cir. 1998); Charlie F. v. Bd. of Educ., of Skokie Sch. Dist., 98 F.3d 989 (7th Cir. 1996); Heidemann v. Rother, 84 F.3d 1021, 1023 (8th Cir. 1996); Witte v. Clark Cty. Sch. Dist., 197 F/3d 1271, 1275 (9th Cir. 1999). In any event, our panel is bound by the decision of the Crocker panel. United States v. Yoon, 398 F.3d 802, 806 (6th Cir. 2005). No monetary damages may be awarded to the plaintiff in this case under the IDEA.

Long also seeks money damages under 42 U.S.C. Section 1983. In Gean v. Hattaway, 330 F.3d 758 (6th Cir. 2003), we affirmed the view taken in Covington v. Knox County Sch.Sys., 205 F.3d 912 (6th Cir. 2000) that IDEA claims "may be brought either directly under the IDEA's own provisions for dispute resolution, or, in some circumstances, under 42 U.S.C. Section 1983." However, it appears that our court has not allowed plaintiffs to seek monetary damages for violations of the IDEA under Section 1983. That is appropriate, as Section 1983 doe not permit us to recognize rights that are not specifically provided for in federal law. See, e.g., Gardenhire v. Schubert, 205 F.3d 303 (6th Cir. 2000). The existence of express remedies in a statutory scheme demonstrates

that Congress intended to supplant other remedies that might otherwise be available to complainants. Middlesex County Sewerage Authority v. National Sea Clammers Ass'n, 453 U.S. 1, 14-15 (1981); see also city of Rancho Palso Verdes v. Abrams, 544 U.S. 113, 120; Blessing v. Freestone, 520 U.S. 329, 342 (1997).

Long seeks in this litigation to have the Department's final 1999 administrative order enforced by the federal courts. The state has argued that the governing statutory framework does not provide for such enforcement. The state has argued that the governing statutory framework does not provide for such enforcement. The state argues further that, before the federal courts could provide such a remedy, Long must first exhaust her administrative remedies.

The IDEA provides for two administrative procedures. The first is called the due process hearing. 20 U.S.C. Section 1415(f), codified in 34 C.F.R. Sections 300.506-300.515, implemented in the State of Kentucky as 707 KAR 1:340Section 2-8 (West 2004). As noted supra. Long initiated her due process procedure against the school district in 1994. She also abandoned it almost immediately.

The second approach is the complaint resolution procedure, or CRP, authorized in 20 U.S.C. Section 1221e-3, which provides for promulgation of the Education Department General Administrative Regulations ("EDGAR"). The regulations, which comprehend the CRP, were codified as 34 C.F.R. Sections 300.660-300.662 and implemented in the State of Kentucky as 707 KAR 1:340 Section 15 (West 2004). In 1999, Long began a CRP. Our case is a lawsuit seeking relief from the remedy furnished in that CRP.

The due process hearing procedure contains certain safeguards not evident in the CRP. For example, Section 1415(i)(e)(A) expressly authorizes an appeal in federal court. The state regulations that implement the hearing procedure reiterate this authorization. 707 KAR 1:340 Section 8(2). There is no comparable federal or state statutory or implementing regulatory language that authorizes federal review of the outcome of the CRP procedure. Kentucky's CRP administrative regulations do refer to

an appeal to the Commissioner of the Department of Education, but no more. 707 KAR1:340 Section 15(4).

The district court concluded "an appeal of the CRP final decision is unavailable here." The court made several further trenchant observations:

"Labeling this complaint an appeal from the CRP decision probably confuses already difficult issues. The Department's most important conclusions were that Dawson Springs had failed to provide a FAPE and that Plaintiff was entitled to compensatory services for an equal time period. Its order neither specified nor ordered specific compensatory services. It left that job to ARC meetings between the school district and the parents. Tellingly, Plaintiff has never expressed disagreement with any part of the Department's final order. Thus, it is not surprising that she never initiated an administrative appeal from any part of the Department's administrative findings or order."

In a footnote to this portion of its Memorandum Opinion, the district court recalled that"[b]oth the Department and this Court have determined that Dawson Springs has complied with [the Department's order]."

In an effort to disentangle the various components of the case, the district court contemplated the possibility that the "Longs' real aim may be to challenge the sufficiency of their daughter's current educational services." If this were the case, the district court wrote, the record available to it-and to our court-would not be sufficient for federal review. The plainti9ff would first have to exhaust all available administrative remedies under the IDEA, including the due process hearing approach. This is correct. After all, the IDEA gives the "primary responsibility...for choosing the educational method most suitable to the child's needs...to state and local educational agencies in cooperation with the parents or guardian of the child." Hendrick Hudson, 458 U.S. at 207. The federal courts are not the entities best equipped to craft an IEP or remedial substitutes. They are, instead, suited to reviewing detailed administrative records, such as those that would be furnished through due process hearings (the statutory provision for which also provides for federal appeal therefrom) under the IDEA. As the

district court noted, "Plaintiff has not pursued her due process remedies either with respect to the 1992-1994 or the 1999-2003 time periods."

It is lamentable that, twelve years after the Long family first sought a due process hearing, which they subsequently abandoned, the parties remain in such an apparently intractably adversarial posture. Holly has received educational services that might be said to discharge the school district's obligations under the Departmental order. But it can only be speculated what she would have received had the Long family not abandoned the federally appealable administrative procedure.

Long also claims violations under Title VI of the Civil Rights Act of 1964, 42 U.S.C. Section 2000(d); Title IX of the Educational Amendments of 1972; Section 504 of the Rehabilitation Act of 1973; and Title II of the American with Disabilities Act of 1990. In 1985, Congress amended the IDEA to include a provision stating that 'before the filing of a civil action under such laws seeking relief that is also available under this part, the procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required if the action has been brought under this subchapter." 20 C.F.R. Section 1415(1); see also Pub.L. No. 99-372, 100 Stat. 796 (1986); S. Rep. No. 99-112 at 2 (1985), reprinted in 1986 U.S.C.C.A.N. 1798, 1799. Subsection (f) provides for the due process hearing under the IDEA.

The exhaustion requirement applies to this case. Out court has nto yet made this requirement explicit for all cases that involve IDEA claims, but our sister circuits have done so, especially where the plaintiff's claims related directly to his or her access to a FAPE. See, e.g., Frazier v. Fairhaven Sch. Dist., 276 F.3d 52 (1st Cir. 2002); Polera, 288 F.3d 478; Robb v. Bethel Sch. Dist.#403, 308 F.3d 1047 (9th Cir. 2002); Cudjoe v. Ind. Sch. Dist No. 12, 297 F.3d 1058 (10th Cir.); Babicz v. School Board of Broward County, 98 F.3d 989 (7th Cir. 1996). Based on the plain language of the IDEA amendment, which itself is sufficient, and upon the interpretation of this amendment by our sister circuits as it applies to a case such as ours, we conclude that Long must first exhaust her administrative procedure before suing in federal court.

III

We affirm the district court's judgment dismissing this action for lack of exhaustion. The parties agreed at oral argument that the Long family may still seek a due process hearing, pursuant to 707 KAR 1:340 Section 5.

APPENDIX B

No. 05-5535

FILED
NOV 13 2006
Leonard Green, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

HOLLY LONG,

Plaintiff-Appellant

v.

DAWSON SPRINGS INDEPENDENT SCHOOL DISTRICT, ET AL.,

Defendants-Appellees

ORDER

BEFORE: BOGGS, Chief Judge; SUTTON, Circuit Judge; and

HOOD, District Judge

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

SIGNED, Leonard Green

Leonard Green, Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

CIVIL ACTION NO. 3:01CV-389-H

HOLLY LONG PLAINTIFF

V.

DAWSON SPRINGS INDEPENDENT
SCHOOL DISTRICT, et al.

MEMORANDUM OPINION

Plaintiff, Holly Long, attended school in the Dawson Springs Independent School district ("Dawson springs") between January, 1992, and December, 1994. The Long family believes that during that time Dawson Springs completely failed its responsibility to provide appropriate educational services to address their daughter's learning impairments. In 1999 the Kentucky Department of Education (the "Department") ruled in their favor. The Longs allege that between 1999 and 2003 Dawson Springs again failed to provide appropriate compensatory educational services. Holly Long is now twenty-seven years old and still needs specialized training.

Plaintiff asserts causes of action under the Individuals with Disabilities Education Act ("IDEA"), Title VI of the Civil Rights Act of 1964, Title IX of the Educational Amendments of 1972, section 504 of the Rehabilitation Act of 1973, Title II of the Americans with Disabilities Act of 1990 and the Freedom of Information Act ("FIOA"). The dispute now focuses on the remedies available under these statutes and, particularly, whether any legal theory can support a claim for compensatory damages arising from these lengthy and complicated series of events.

The Court concludes the compensatory money damages are unavailable under any of the theories alleged. Plaintiff doe have a claim for appropriate educational services. The proper method of asserting such a claim, however, is not by an original action in federal court.

I.

It is important to set out the entire context of events beginning with those occurring over a decade ago. Holly Long began her schooling in the Fayette County schools. She was classified as a special education student under the IDEA. Her real difficulties began after leaving Fayette County.

On January 28, 1992, at the age of fourteen, Holly Long enrolled in the Dawson Springs Schools in Hopkins County, Kentucky. All concerned recognized that she was entitled to a free and appropriate public education ("FAPE"). After a period of time, the Long family became dissatisfied with their daughter's education, believing that Dawson Springs was not complying with the IDEA. Consequently, on September 29, 1994, Plaintiff requested such a hearing as provided by 20 U.S.C. Section 1415(f) and as implemented in 707 KAR 1:340, Sections 5-8 (the "due process" hearing) contending that Dawson Springs had failed to implement Plaintiff's individual education program ("IEP") and that her educational placement was inappropriate. Pursuant to Kentucky's regulations, the Department appointed a hearing officer and scheduled a hearing for November 15, 1994. Shortly thereafter, the Long family requested that the hearing be cancelled. The Department dismissed the due process proceeding, and the Long family never requested that it be reopened.

On December 7, 1994, Holly withdrew from the Dawson Springs schools. She subsequently enrolled in the Oldham County School District where the family apparently moved. For the next four years Plaintiff attended Oldham Sounty Schools. In the spring of 1998, Plaintiff completed her twelfth year of formal secondary education and her final year in the Oldham County schools. This led directly to the events that are the central focus of this case.

A.

On May 27, 1998, Plaintiff filed a complaint under the Department's complaint resolution procedures as implemented in 707 KAR 1:340 Section 15 (the "CRP"). The complaint alleged that Dawson Springs had failed to fully implement Holly's IEP's during the time between August, 1991, and December, 1994. The Longs' purpose was to obtain additional educational services for their daughter. Pursuant to its regulations, the Department

investigated the matter and on September 2, 1998, issued eight sets of findings of fact and conclusions. In summary, those findings of fact and conclusions stated:

> "1. Dawson Springs had approved policies and procedures in place for ensuring the implementation of full educational opportunities for Plaintiff. However, it failed to implement the transferred IEP in a timely manner, failed to provide post-secondary transition planning and failed to implement the IEP's as written. Therefore, Dawson Springs failed to provide a free and appropriate education to Plaintiff.
>
> 2. Dawson Springs provided placement in the least restricted environment on a regular basis and offered placement alternatives to the parent, provided a continuing replacement alternatives and offered placement in a least restrictive environment.
>
> 3. Dawson Springs did not provide post-secondary transition planning for Plaintiff. Even though the parents may not have attended meetings and may not have cooperated with planning, that did not relieve Dawson Springs of its obligation under this requirement.
>
> 4. Dawson Springs did not implement a system to monitor, collect and report progress data for any of the short-term instructional objectives set out in the IEP's from 1991 through 1994. Dawson Springs did not ensure implementation of any CRP IEP's as written during that period.
>
> 5. Dawson Springs provided a computer and printer for Plaintiff's use at school, evaluated the student for assistive technology devices and offered to provide the recommended assistive technology.
>
> 6. Dawson Springs failed to provide a comprehensive framework or multi-year course of study, failed to determine whether Plaintiff was eligible for a diploma or certificate of completion, and failed to provide a graduation plan.
>
> 7. Dawson Springs did not make an extended year program available and did not determine whether Plaintiff needed extended school year services.

> 8. Plaintiff is entitled to compensatory services for the time she was denied a FAPE, which was approximately three years. Dawson Springs was required to convene an ARC (Fn. 1) meeting as soon as it can be conveniently arranged, to discuss compensatory services for the time period Plaintiff was denied FAPE. Dawson Springs was required to submit documentation of this ARC meeting of the Division of Exceptional Children Services within ten days of the meeting.

At the conclusion of the written decision, the Department advised Plaintiff pursuant to 34 DC.F.R. 300.661(d) (repealed 1999), that she could appeal the decision to the United States Department of Education. (Fn. 2) Plaintiff did not pursue an appeal or review of the Department's findings.

Dawson Springs did seek a reconsideration of the Department's findings. (Fn. 3) For inexplicable reasons, the Department took over a year later to do so and to issue a final decision. Eventually, on September 28, 1999, the Department affirmed the Department's earlier findings in all respects, except as to finding number 6. The final decision concluded by stating that:

> "The September 2, 2998, report of findings determined the student was not provided FAPE during the period investigated. Therefore, the student is entitled to compensation for educational services not provided. The corrective action ("CAP") requires the district to convene an ARC meeting with the student to determine how, when, where and in what form the services will be provided. The district must submit to this office copies of the ARC meeting invitations as well as conference summary reports which describe the results of any ARC meetings held with the emancipated student by November 30, 1999.

In sum, the Department concluded that Dawson Springs had failed to provide a FAPE for Holly Long from 1992 through 1994;

and required it to provide additional compensatory educational services "for the time period Plaintiff was denied a FAPE." The Department did not specify the services required. (Fn. 4) Instead, the Department ordered Dawson springs to convene an ARC meeting to determine "how, when, where and in what form" it should provide needed educational services. Such an order is consistent with the IDEA's statutory scheme, that parents, teachers and education specialists make the first efforts to reach agreements on an individual educational plan.

B.

The next sequence of events concerns the parties' interactions over the next twenty months as each attempted to fulfill the Department's final decision.

Soon after receiving the final order, Dawson Springs scheduled an ARC meeting as the CRP decision required. The Long family asked that the meeting occur in Frankfort and that a Department representative attend. The Department said that it had no role in the ARC and declined to send a representative. The Long were reluctant to meet alone with Dawson Springs. As a consequence of these differences, several months of discussions. followed. Dawson Springs agreed to pay for two months of evaluation services by Career Visions. As a part of this process, Dawson Springs forwarded a questionnaire to Career Visions to elicit information about Plaintiff's needs and abilities in an educational setting.

More delays followed; the Long family distrusted school district officials; Dawsnon springs refused to commit to any particular services without a new assessment of Holly Long's needs, Finally, Career Visions completed this evaluation and Dawson Springs scheduled another ARC. More delays occurred when Dawson Springs had difficulty contacting the Longs by phone and then the Longs' attorney resigned from the case. Consequently, Dawson Springs Superintendent David Boggs communicated directly with the Longs by letter dated July 13, 2000. As a full settlement of its obligations, Dawson Springs proposed to provide:

> "Compensatory education through written contract for computer education training with a company like Career Visions for up to a maximum of 104 weeks beginning July 1, 2000, consisting of two sessions for one and half hours per session at a maximum of $75 per hour for training, $30 per hour for travel time and 31 cents per mile for travel to sessions."

Plaintiff's new attorney rejected the offer, noting that the Department required Dawson Springs to provide compensatory education for the same period of time it had been denied.

In response to this apparent deadlock, Dawson Springs once again scheduled an ARC. After one rescheduling, all participants attended an ARC on September 20, 2000. At this meeting the parties agreed that Career Visions would complete the questionnaire previously sent by Dawson Springs. After receiving the questionnaire from Career Visions, Dawson Springs scheduled another ARC for November17, 2000. At that meeting, Dawson Springs agreed to furnish Plaintiff the use of a computer. Nevertheless, it maintained that the duration of the compensatory education should be two years. It is a measure of the complete distrust among the parties that one year after the Department's final order they had yet to complete a satisfactory ARC.

As a next resort, the Longs tried to enlist the Department's assistance in achieving their objectives. On November 30, 2000, Plaintiff's counsel wrote the Department objecting to the delays and to Dawson Springs' ARC proposals. The Department responded stating that its September 2, 1998, decision required Dawson Springs to "convene an ARC meeting with the student as soon as it can be conveniently arranged, to discuss compensatory services for the time period the student was denied FAPE"...and to "submit documentation of this ARC meeting to the Division of Exceptional Children Services." The Department concluded that the "proposal of the ARC satisfies the requirement to develop a corrective action plan and closes this complaint."

It was not the place of its staff members, the Department said, to make decisions about educational services for students. Finally, the letter stated that

> "If the parent in an ARC meeting does not agree with the outcome of an ARC decision, she may request mediation or a due process hearing to resolve the dispute. The procedures that must be followed by the parent to request mediation or a due process hearing are contained in 707 KAR 1:430, Sections 5,6,7 and 8 as well as 34 C.F.R. Part 300.506, 507, 508, 509 and 510. Additionally, the administrative procedures contained in KRS Chapter 13B apply to due process hearings. As you are aware, these procedures have to be exhausted prior to filing any type of civil action."

Plaintiff's counsel disagreed with this interpretation, arguing that the Department itself should implement corrective action. On February 8, 2001, the Department reiterated its previous opinion and stated that it had closed the file. Once again, the Department reminded the Long family that, if it disagreed with the ARC, it could file for a due process hearing.

The parties continued their attempt at mediation. On May 22, 2001, the attended a conference to discuss a potential settlement. At this point, the parties had engaged in over one and a half years of discussions. By now, Dawson Springs had made a unilateral proposal of educational services. The Long family thought that the proposal was insufficient and that the Department should exercise its own power to require a specific compliance with the administrative order. The Department refused to initiate such action. The confluence of these events led to the next stage of the on-going dispute.

C.

On June 28, 2001, Plaintiff filed this complaint in federal court. A week later, Dawson Springs asked Career Visions to begin providing services for Holly pursuant to the ARC corrective action plan approved on November 17, 2000, and using the milestone measurements proposed by Dawson Spring's consultant. Dawson Springs pressed Career Visions to begin providing services. Career

Visions advised Dawson Springs that the Long family had refused to allow the services to begin. The services did not begin.

On September 14, 2001, Defendants moved to dismiss the complaint. After reviewing the status, the Court concluded that animosity between parents and school officials was preventing cooperation that could benefit Holly Long. Therefore, on May 21, 2002, the Court convened a telephonic conference during which the parties eventually agreed to circulate the names and curriculum vitae of three professionals who would evaluate Ms. Long and make reports on a six-month basis. On July 26, 2002, because the parties were making positive efforts to resolve the case, the Court denied all the pending dispositive motions without prejudice to renew them. The Court determined to focus the parties on the remedial services that would most benefit Ms. Long. Dawson Springs was willing to pay for education services which they believed would be beneficial.

After several months the parties agreed that Dr. Deborah Bauder would recommend a program of services and a method for evaluating those services. The process began slowly. When Dr. Bauder attempted to evaluate Holly directly, her counsel objected and stated that their was no need for additional testing. At one point, Plaintiff's counsel told the Court that the only acceptable remedial services were those ordered years ago by the Department of Education Appeals Panel.

On May 9, 2003, the Court convened another conference at which time the parties did agree on a program of services and assessments for a period up to 36 months. From this time forward, Dawson Springs reimbursed those providing agreed upon services. Shortly thereafter, the Court requested and received progress report from Career Visions concerning Holly Long. Upon review, the Court concluded that Holly Long was receiving these services satisfactorily and that the promise of continuing those services could resolve the disputes at issue.

On August 10, 2004, upon recommendation of Career Visions, the Court authorized expansion of Ms. Long's educational services to four hours a day, two days a week. On November 9, 2004, the Court appointed Dr. Robert Glass to monitor and evaluate

Holly Long's education and training. Dr. Glass completed his first evaluation within a month of his appointment.

II.

Plaintiff's primary claim is under the IDEA. 20 U.S.C. Sections 1400-1490. That statute imposes the general requirement that school districts which receive federal funding provide a "free appropriate public education" for all classes of students with special needs. 20 U.S.C. Section 1412; Bd. of Ed. Of Hendrick Hundson Central Sch. Dist., Westchester Cty. v. Rowley, 458 U.S. 176,179 (1982). Recognizing that each student has different needs, the IDEA establishes a procedural framework in which school administrators, teachers, parents and the student work together to formulate an IEP specifically tailored to the student's needs and abilities. 20 U.S.C. Sections 1401(11), 1414(d); Sch. Comm. of Town of Burlington, Mass. v. Dep't of Educ. of Mass., 471 U.S. 359, 368 (1985). The most difficult and distressing problems arise when the parties cannot agree on such a plan. In those circumstances, the IDEA provides administrative procedures to resolve such disputes. 20 U.S.C. Section 1415(b)

The Long family believes that Dawson Springs has systematically thwarted their daughter's access to appropriate remedial education. Plaintiff complains of illegal conduct over a long period of time and alleges claims under at least half a dozen federal statutes. Because the precise legal theories on which Plaintiff's case rest are difficult to pin down, the Court has tried to evaluate the facts of the case in light of any viable claim for relief plausibly raised. The particular choices and the timing of the parties' actions make this a difficult case. The discussion of some legal issues that may not be dispositive in this case is an effort to provide context for consideration of Holly Long's claims.

A.

Plaintiff's real indignation concerns Dawson Springs' delay in providing their daughter's compensatory education between

September 28, 1999, and June 1. 2003, or about three and half years. They believe that she is entitled to compensatory money damages under the IDEA.

The United States Supreme Court long ago determined that the IDEA authorizes reimbursement to parents for their expenditures on special education that a school board was obligated to provide. Sch. Comm. of Town of Burlington, Mass. v. Dep't of Educ. of Mass., 471 U.S. 359, 369-370 (1985). While the Court in Burlington did not directly address what other remedies might be available, it did say that the characterization of reimbursement as "damages" was unfounded. Id. At 370-371 ("Reimbursement merely requires the Town to belatedly pay expenses that it should have paid all along and would have borne in the first instance had it developed a proper IEP"). The Sixth Circuit interpreted Burlington as saying that money damages are not available for IDEA violations. Crocker v. Tennessee Secondary school Athletic Association, 980 F.2d 382, 386 (6th Cir. 1992). Plaintiff is highly critical of this decision and essentially asks this Court to ignore it.

Despite its brief and less than compelling analysis, Crocker is consistent with the subsequent prevailing view among the circuits. See Polera v. Board of Education, 288 F.3d 475, 485-6 (2nd Cir. 2002). The First, Second, Fourth, Seventh, Eighth, and Ninth Circuits have also held that damages are unavailable under the IDEA. Nieves-Marquez v. Puerto Rico, 353 F.3d 108, 124 (1st Cir. 2003) (concluding that tort-like money damages are not available under the IDEA); Polera, 288 F.3d at 486 (concluding that a damages remedy is "fundamentally inconsistent" with the goals of the IDEA); Sellers v. School Board of Manassas, Va., 141 F.3d 524, 527 (4th Cir.), cert denied, 525 U.S. 871 (1988)(holding that "[t]ort-like damages are simply inconsistent with IDEA's statutory scheme"); Charlie F. v. Board of Education of Skokie School District, 98 F.3d 989 (7th Cir. 1996)(concluding that "damages are not 'relief that is available under the IDEA"); Witte v. Clark County School District, 197 F.3d 1271, 1275 (9th Cir. 1999)(finding damages unavailable under the IDEA). The Third and Fifth Circuits have addressed the issue without stating a definite "no." W.B. v. Matula, 67 F.3d 484 (3rd Cir. 1995); Salley v. St. Tammany

Parish School Board, 57 F.3d 458 (5th Cir. 1995). Thus, Crocker is sound and binding precedent. Nothing in the development of the case since Crocker diminishes it.

The sixth Circuit's conclusion in Crocker is consistent with this Court's understanding that the IDEA's statutory scheme provides a basis for parties to discuss, agree upon and dispute the educational services that a particular child needs. This Court agrees with the recently expressed view of the First Circuit that "[U]nder the identical remedial language of the EHA, the Supreme Court held that the district court could order reimbursement of private educational expenses because—and the Court was emphatic on this point—such reimbursement did not constitute damages." Nieves-Marquez v. Pueto Rico, 353 F.3d 108, 125 (1st Cir 2003) citing Burlington, 471 U.S. at 370-71.

Perhaps suspecting the unavailability of monetary damages under the IDEA, Plaintiff also asserts a claim of damages under the IDEA, Plaintiff also asserts a claim for damages under 42 U.S.C. Section 1983. Whether a Section 1983 claim may be founded under IDEA violations is an issue that is hotly disputed. See Matula, 67 F3d at 494-95 (3rd Cir. 1995)(holding that Section 1983 actions may enforce IDEA) and Padilla ex rel Padilla v. School Dist. No. 1 in City and County of Denver, Colo. 233 F.3d 1268, 1282-73, FN 5 (10th Cir. 2000) (including a thorough discussion of the circuit-split on the issue and holding that IDEA on its own could not be the basis for a Section 1983 action). Id. At 1273. The Sixth Circuit, however, has at least implied that IDEA rights may be the basis of a Section 1983 suit. Crocker, 980 f.2d at 387 (6th Cir. 1992). The Court will assume for the sake of argument that the implied holding in Crocker is sound and authorizes a Section 1983 action based on the IDEA.

The mere availability of Section 1983 relief, however, does not necessarily guarantee recovery of compensatory damages. By its own terms Section 1983 relief, however, does not necessarily guarantee recovery of compensatory damages. By its own terms Section 1983 creates no substantive rights; it only provides remedy for deprivation of those rights secured elsewhere. 42 U.S.C. Section 1983. The Sixth Circuit has said that a Section 1983

lawsuit may not expand existing statutory rights. Gardenshire v. Schubert, 205 F.3d 303 (6th Cir. 2000); Crocker, 980 f.2d at 387 (6th Cir 1992). Crafting this complaint as a Section 1983 action, therefore, does not expand those rights that the IDEA provides. Id. For all the reason previously stated, this Court agrees with Crocker and is bound to follow it. The IDEAS focuses on ensuring educational services, not awarding damages. Consequently, the Court finds no basis for a federal action for compensatory damages, either directly or though Section 1983, to remedy alleged violations of the IDEA.

Another basis for a Section 1983 action is the denial of procedural due process. U.S. Const. Amend. 14; 42 U.S.C. Section 1983. Plaintiff could argue that both Dawson Springs and the Department have effectively denied or abrogated her due process rights. The Second and Third Circuits have suggested that a plaintiff may pursue money damages for denial of access to administrative remedies made available under IDEA. Polera v. Board of Education of Newburgh Enlarged City School Dist., 288 F.3d at 483 (2nd Cir. 2002); Quackenbush v. Johnson City School District, 716 F2d 141 (2nd Cir. 1983); Muth v. Central Bucks Sch. Dist., 839 F.2d 113, 127 (3rd Cir. 1988); W.B. v. Matula, 67 F.3d 484, 495 (3rd Cir. 1995).

Even should this Court adopt this view as Sixth circuit law, however, the Court would not find such a claim viable here. Plaintiff actually received an administrative hearing and has voiced no objection to it. Plaintiff has an available remedy by either requesting an ARC or filing a due process grievance based on her disagreement with the current education services. Due process does not require that the Department enforce its own remedy. The Department continues to provide perfectly acceptable due process procedures. Plaintiff has made no specific objections to those procedures. On these facts, the Court can find no basis for a Section 1983 due process claim concerning enforcement of the administrative final decision dated September 28, 1999.

C.

As an alternative IDEA remedy, Plaintiff seeks enforcement of the Department's 1999 final administrative order requiring Dawson Springs to provide additional compensatory education. Defendant responds that the statutory framework does not authorize a federal appeal to enforce a CRP ruling. Moreover, Defendant says that any such remedy would require exhaustion of administrative procedures first. To resolve this disagreement requires a close analysis of the statutory and regulatory language and history.

Two distinct administrative procedures are available to enforce rights of special education students under the IDEA. In truth, a lot of confusion surrounds the purpose of legal status of these separate procedures. The first is the so-called due process hearing procedure required by 20 U.S.C. Section 1415(f), further codified in 34 C.F.R. Sections 300.506-300.515 and implemented in Kentucky by 707 KAR 1:340 Sections 2-8 (West 2004). Plaintiff initiated and abandoned her due process remedy on claims against Dawson Springs in 1994. The second is the so-called complaint resolution procedure or CRP authorized in 20 U.S.C. Section 1221e-3, that provided for promulgation of the education Department General Administrative Regulations ("EDGAR"). These regulations, including the CRP, were most recently codified in 34 C.F.R. Sections 300.660-300:662 and implemented in Kentucky by 707 KAR 1:340 Section 15 (West 2004). Plaintiff initiated her own CRP in 1999, from which she now seeks a federal court remedy. Each of these procedures provides an independent means of redressing complaints about IDEA compliance. Irrespective of their related purposes, the two procedures differ in significant ways. Their separate statutory and regulatory origins affect the type of relief available under each.

The most significant difference is that the due process hearing has procedural safeguards that the CRP does not. Those procedural safeguards are detailed in both Section 1415 of the IDEA and in regulations implementing the IDEA, not in the statute itself. The location of the implementing regulations is significant because Section 1415(i)(2)(A) of the IDEA authorizes a civil action for parties "aggrieved by finding and decision made under

subsection (f) or (k) of this section." The term "this section" refers to Section 1415 in which the CRP is not included. Not only does Section 1415(i)(e)(A) authorize a federal appeal; the implementing state regulations make reference to it as well. 707 KAR 1"340 Section 8(2). On the other hand, the Court finds that no statutory language actually authorizes an appeal from the Department's CRP findings. Nor do the federal or state implementing regulations make reference to a federal appeal from a CRP finding. The current state CRP administrative regulations make reference only to an appeal to the Commissioner of Education. 707 KAR 1:430 Section 15(4). A federal appeal from an administrative regulation is simply unavailable without express statutory authorization. Therefore, the Court concludes that an appeal of the CRP final decision is unavailable here.

Labeling this complaint an appeal from the CRP decision probably confuses already difficult issues. The Department's most important conclusions were that Dawson Springs had failed to provide a FAPE and that Plaintiff was entitled to compensatory services for an equal time period. Its order neither specified nor ordered specific compensatory services. It left that job to ARC meetings between the school district and the parents. Tellingly, Plaintiff has never expressed disagreement with part of the Department's final order. Thus, it is not surprising that she never initiated an administrative appeal from any part of the Department's administrative findings or order. (FN 19)

The Longs' real aim may be to challenge the sufficiency of their daughter's current education services. To do so, however, they must exhaust all available IDEA Administrative remedies before pursuing a federal complaint. Gean v. George W. Hattaway, 330 F.3d 758. 776 (6th Cir. 2003); James v. Upper Arlington City School District, 228 F.3d 764, 768-69 (6th Cir. 2000); and also see S.S. v. Eastern Kentucky University, 307 F.Supp.2d 853, 857 (E.D. Ky. 2004). The exhaustion requirement is fundamental to the enforcement of IDEA rights and responsibilities. The reason for this eminently sensible. Federal courts do not possess the expertise to determine the precise nature of an appropriate individual education plan. Stutts v. Eastern Kentucky University, 307

F.Supp.2d 853, 857 (E.D.Ky. 2004)(citing Charlie F. v. Bd. of Educ. of Skokie Sch. Dist., 98 F.3d 989, 992 (7th Cir. 1996). The IDEA leaves the "primary responsibility...for choosing the educational method most suitable to the child's needs...to state and local educational agencies in cooperation with the parents or guardian of the child." Bd. of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley, 458 U.S. 176, 207 (1982).

Federal courts are more appropriately able to review an existing administrative record to determine whether that decision was adequately supported or whether it was arbitrarily conceived. Plaintiff has not pursued her due process remedies either with respect to the 1992-1994 or the 1999-2003 time periods. Without an underlying administrative record and the testimony of education experts, a federal court cannot evaluate de novo the appropriateness of the services Dawson Springs is currently providing.

III.

Plaintiff also alleges violations of Title VI of the Civil Rights Act of 1964, 42 U.S.C. Section 2000(d); Title IX of the Educational Amendments of 1972; Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act of 1990. The IDEA does not bar an IDEA claimant from bringing claims under other statutes, including those brought here. Indeed, in response to Smith v. Robinson, 468 U.S. 999 (1984), Congress appears to have amended the IDEA to expressly preserve such rights. See Pub. L. No. 99-372, 100 Stat. 796 (1986); S. Rep. No. 99 112 at 2(1985), reprinted in 1986 U.S.C.C.A.N. 1798, 1799. However, that amendment did say that "before the filing of a civil action under such laws seeking relief that is also available under this part, the procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required if the action had been brought under this subchapter." 20 U.S.C. Section 1415(l). Subsection (f) is IDEA's due process hearing provisions. Several questions arise from this seemingly straightforward requirement.

A.

One question is whether the exhaustion requirement applies to all cases that plausibly involve IDEA claims. In Covington v. Knox County School System, 205 F.3d 912, 915-6 (6th Cir. 2000), the Sixth Circuit only went so far as o pronounce that "some courts have interpreted Section 1415 to require the exhaustion of administrative remedies even where the plaintiffs do not exclusively on the IDEA source of their claims." More recently, Judge Hood in the Eastern District of Kentucky considered the Covington case and reached the logical extension of its comments. He concluded that section 1415 "requires the exhaustion of administrative remedies prescribed under the IDEA, even when the plaintiffs do not rely on the IDEA as the source of their claims, if their claim is sufficiently related to 'free and appropriate public education' to a disabled child under the IDEA." Stutts, 307 F.Supp.2d at 857 (internal citations omitted).

This Court is convinced that the plain language of the statute and its that the plain language of the statute and its overall policy together justify such an interpretation. Indeed, a majority of the federal appellate courts have reached the same conclusion as Judge Hood. See Robb v. Bethel School Dist. #403, 308 F.3d 1047 (9th Cir. 2002); Cudjoe v. Independent School District No. 12, 297 f.3d 1058 (10th Cir. 2002); Polera v. Board of Education of Newburgh Enlarged City School District, 288 F.3d 478 (2nd Cir. 2002); Frazier v. Fairhaven School District, 276 F.3d 52 (1st Cir. 2002); Weber v. Cranston School Committee, 212 F.3d 42 (1st Cir. 2000); Babicz v. School Board of Broward County, 135 F.3d 1420 (11th Cir. 1998); and Charlie F. v. Board of Education of Skokie School District, 98 F.3d 989 (7th Cir. 1996). Here, Plaintiff's claims concern almost entirely issues relating to a "free and appropriate education." The factual foundation of these claims is the same as that underlying Plaintiff's IDEA claims based on the acts of Dawson Springs during the same time period.

For all these reasons, the Court concludes that Plaintiff must exhaust her IDEA administrative remedies before bringing claims concerning the same matter under other statutes in this Court.

B.

A second question is whether the CRP hearings satisfy the IDEA's exhaustion requirement, thus paving the way for Plaintiff to pursue these other claims. All but one of the circuits that have addressed this question have found that state CRP procedures are insufficient to satisfy the IDEA's administrative exhaustion requirement. Weber v. Cranston Sch. Comm., 212 F.3d 41, 53 (1st Cir. 2000) (analyzing exhaustion requirements prior to asserting a Section 504 Rehabilitation Act claim); Association for Community Living in Colo. v. Romer, 992 F.2d 1040, 1043-44 (10th Cir. 1993) (analyzing the EDGAR provisions); also see Megal C. v. Independent School Dist. No. 625, 57 F.Supp.2d 776, 789-90 (D.Minn. 1999). (FN 20) Those courts noted that CRP's are different in purpose, scope and procedure from due process hearings. This Court agrees that a CRP is generally "not an adequate alternative to exhausting administrative remedies under the IDEA." Romer, 992 F2d at 1045.

Nothing about our facts, moreover, suggest that a different result is appropriate. The CRP administrative record is woefully short on the type of individualized educational assessment found in a due process hearing record. Plaintiff did not present evidence either that her grievances fall outside the scope of an IDEA due process proceeding or that exhaustion of that remedy would be futile. Plaintiff's primary complaint has both its source and its remedy in educational services offered to Holly Long. Finally, it is illogical that the CRP hearing in these circumstances might also constitute exhaustion of an administrative process because Plaintiff's statutory claims arise from events occurring after the CRP hearing.

For all these reasons, Plaintiff falls short of fulfilling the exhaustion requirement.

IV.

Plaintiff has asserted privacy claims under the Family Education Rights and Privacy Act ("FERPA"), the Freedom of Information Act ("FOIA") and under IDEA regulations. These claims were based upon Dawson springs having either obtained or provided certain of Holly Long's educational records as part of its efforts to determine the appropriate education program for her. As Plaintiff now acknowledges, no private right of action exists for unlawful disclosure under FERPA. Gozanga University v. Doe, 536 U.S. 273 (2002). Similarly, FOIA is not designed to provide a private right of action for unlawful disclosure. NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975)

Plaintiff claims a federal privacy right under the IDEA through 42 U.S. Section 1983. However, the IDEA does not authorize a separate cause of action under any of its privacy provisions. While the IDEA's implementing regulations do require school districts to seek a parent's consent before transferring files (34 C.F.R. Section 300.571), this claim like others Plaintiff raises here must be raised and evaluated by a impartial due process hearing officer before it can be reviewed by the Court. This claim, that Dawson Springs did not get consent before transferring files has not been raised in any administrative procedure. Any claim of privacy must be made either through a due process hearing or pursuant to IDEA regulations. Plaintiff has made no such claim.

V.

Plaintiff has alleged that the Kentucky Department of Education has failed in its obligations to require school boards in the state to provide compensatory education for her and has failed to enforce its own rulings. This Court has dismissed all claims against the Department..

The Court found neither a factual nor legal basis for the claims against the Department. Both 1994 and 1998, the Department complied with its administrative responsibilities under the due process and CRP regulations. In the former instance, Plaintiff voluntarily dismissed the proceedings. In the latter instance, Plaintiff made no claim against the Department and

expressed no disagreement with its ruling. Plaintiff has no federal appeal from the Department's ruling and this Court has determined that an independent action in federal court is unavailable as well.

The Court agrees with the Department's subsequent legal position that if Plaintiff was dissatisfied with Dawson Springs' educational services, the appropriate remedy was through and ARC meeting or due process hearing.

VI.

This is a distressing case because the Department did find that Dawson Springs failed to comply with its IDEA obligations between 1991 and 1994. After such a serious rebuke, one would have thought that Dawson Springs would be more than eager to provide needed educational services. Sadly, it did not happen. Nevertheless, the delays cannot be laid solely upon Dawson Springs. The Longs chose not to pursue their IDEA rights back in 1994. They chose not to pursue available due process remedies between 1999 and 2003, even after the Department pointed them in the right direction.

The foregoing analysis reveals the proper procedure in these circumstances. The CRP final decision required Dawson Springs to set an ARC to determine the exact nature of Ms. Long's compensatory education. If the Longs could not receive satisfaction through an ARC or if the process was unduly delayed, their options for redress under the IDEA seem clear enough. Recourse to a due process hearing officer pursuant to 707 KAR 1:340 Section 5 is still available to the Longs. Should the Longs be dissatisfied by the due process result, the state regulations establish an appeal to an Exceptional Child's Board panel, and then to federal court. There is little indication that these avenues would be futile and no argument alleging inadequacy of the due process hearing procedure for resolving the Long's primary complaints. The Court concludes that many of Plaintiff's past and present disputes with Dawson Springs concern educational evaluation and the provision of specific educational services required by the IDEA.

The education experts of the due process hearing procedure are in a better position than the Court to evaluate those claims.

As of this writing, both Dawson Springs and the Long family agreed upon a program of services and assessments that for our purposes are deemed to have begun June 1, 2003, and would extend until June 1, 2006. For the past seventeen months Dawson Springs has provided seemingly appropriate services.

For the reasons set forth in this memorandum, the Court concludes that Plaintiff's attempt to recover a monetary award at this time is without legal basis. Plaintiff is without further federal claims at this time.

The Court will enter an order consistent with this Memorandum Opinion.

December 20, 2004

Signed, John G. Heyburn II
Chief Judge, U.S. District Court

cc: Counsel of Record

Footnotes

1 – "Admissions and release committee (ARC)" means a group of individuals ... responsible for developing, reviewing, or revision an individual education program (IEP) for a child with a disability. 707 KAR 1:280

2 – This provision of the CFR allowing appeal to the U.S. Secretary of Education was removed from the Code in 1999.

3 – The Court can find no procedural basis for the Department's reconsideration of its own findings. The current regulations do provide for an appeal to the Commissioner of the Kentucky Department of Education.

4 – This is not surprising. Neither the formal complaint lodged pursuant to 34 U.S.C. Section 300.600-300.662 nor the subsequent investigation concerned Ms. Long's specific future educational

needs. The CRP focused on the allegations in a formal complaint. The complaint in this case detailed failures in the provision of a FAPE but no information concerning the educational assessment or particularized future educational needs of Ms. Long.

5 – Career Visions is an organization dedicated to helping person with special educational and occupational needs. Career Visions was the Long first choice to provide help to Holly.

6 – As required, Dawson Springs provided minutes of al these ARC meeting to the Department.

7 – The parties have disagreed about the length of time required for compensatory education services under the CRP order. The disagreement is somewhat understandable. Holly enrolled in Dawson Springs school district on January 28, 1992, and left on December 7, 1994. This amounts to approximately 136 calendar weeks. School was not in session for the entire 34 months. This translates to approximately 100 weeks of in-school time or six semesters of school. Nevertheless, this does explain why Dawson Springs insisted for some time that it need only provide 104 weeks of compensatory education. Indeed, through November, 1999, the Long family asserted that Holly was entitled to two years of compensatory education for thirty (30) hours per week.

8 – On February 11, 2002, the Department made a similar motion.

9 – See, Court order, April 3, 2003. The difficulty with this position is that the Department did not actually require specific remedial services, but rather ordered Dawson Springs to undertake a corrective action plan to determine specific compensatory services.

10 – This agreement is set forth in the Court's order dated May 20, 2003.

11 – In its June 29, 2004, Memorandum and Order, the Court considered M.s Long's current progress along with the need to appoint a replacement for D. Deborah Bauder.

12 – The Court also said that it would reconsider the dispositive motions previously removed from the docket and asked the parties to file supplemental responses. The parties have done so.

13 – Dr. Glass was not directly critical of the current services, but did believe that Ms. Long could benefit from expanded services. Dr. Glass did not have available Ms. Long's complete file which might include educational and psychological assessments. Nevertheless, he did make certain recommendations concerning Ms. Long's current services and the expansion of them. The Court does not have the background to assess whether additional services are appropriate.

14 – Plaintiff has not requested monetary relief for Dawson Springs' failure to provide a FAPE between 1992 and 1994. The appropriate remedy at the time-the due process proceeding-was dismissed. Even in Plaintiff's later CRP, she did not ask for or receive a monetary award for IDEA violations between 1992 and 1994.

15 – On district court within the circuit has expressed well founded reservations about the result. See Wayne County regional Service Agency v. Pappas, 56 F.Supp. 2d 807, 818-19 (E.D. Mich. 1999). However, even that opinion acknowledges that Crocker "disallows recovery of monetary, non-restitutional, damages under the EIIA (now IDEA)." Id at 820.
16 – This discussion is a somewhat hypothetical because Plaintiff has not precisely made such an argument. Nevertheless, such a claim, if proven, could well be the basis of a claim for compensatory damages.

17 – The initial complaint resolution were promulgated in 1972 as 45 C.F.R. Section 121a.602 under IDEA's predecessor statute, the

Education of the Handicapped Act ("EHA") Loughlin, 686 P. 22d at 390, n. 7; see also, Beth v. Carroll, 87 F.3d 80, 82 (3rd Cir. 1996) The authority for the procedures lay in EHA Section 1412(6), which provided that "[t]he State educational agency shall e responsible for assuring that the requirements of this subchapter are carried out." Id. On April 3, 1980, the complaint procedure requirement of EDGAR was substituted for 45 C.F.R. Section 121a.602 and codified in 1980 at 45 C.F.R. Section 100b.780 and ultimately at 34 C.F.R. Section 76.780-782. Laughlin, 686 P.2d at 390 n. 7. From 1980 until 1993 the authority for EDGAR was found in the General Education Provisions Act at 20 U.S.C. Section 1221e-3(a)(1), and since 1993 authority has been derived from the Elementary and Secondary Education Act of 1965 at 20 U.S.C. Section 2831(a). Beth, 87 F.3d at 82." Megan c. v. Independent School Dist. No. 623, 57 Supp 2d 776, 785 (D.Minn. 1999). Though this Plaintiff was not explicitly argued this point, some plaintiffs argue that because the CRP was transferred from EDGAR to 34 C.F.R. Part 300, a complaint filed under the CRP is therefore filed under Section 1415. The Court finds no basis for this inference in the CRP's legislative history and the Court takes note that the CRP are codified in subpart F, "State Administration: State Complaint Procedures," rather than Subpart E, "Procedural Safeguards: Due Process Procedures for Parents and Children"-the implementing regulations for IDEA Section 1415. Id.

18 – Both the Department and this Court have determined that Dawson Springs has complied with it.

19 – If Plaintiff had a complaint with the actual findings or order, she probably waited too long to say so. The IDEA does not contain a statute of limitations. The Sixth Circuit has not adopted an entirely consistent approach in locating an analogous statute. See Janzen v. Knox County Board of Education, 796 F.2d 484 (6th Cir. 1986); King v. Floyd County Board of Education, 228 F.3d 662 (6th Cir. 2000) In King, the Sixth Circuit held that appeals from administrative proceedings under the IDEA were subject to the Kentucky's thirty-day limitation period. That case concerned the

appeal of the denial of attorney's fees. However, state and federal statutes commonly require expeditious appeal of any administrative ruling. Applying such a limitation here, where Plaintiff is represented by counsel, is not inconsistent with federal law or policy, Id. at 627. Therefore, the statute of limitations probably bars any claim based upon an appeal of the Department's final order.

20 – The Court that found otherwise allowed a CRP to satisfy the exhaustion requirement only in those cases where the individualized evaluation of a disabled student would be immaterial to the facts in a given case. Christopher S. v. Stanislaus County Office of Education, 2004 WL 2260288, #7 (9th Cir. 2004)

21 – in fact, this Court has considered the claims against the Department on several occasions. On October 11, 2001, the Court issued a Memorandum and Order dismissing the Department. On July 1, 2004, the Court essentially reconsidered that ruling and once again found that Plaintiff could not pursue claims against the Department. At that time, the Court also dismissed claims against David Boggs.

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

CIVIL ACTION NO. 3:01CV-389-H

HOLLY LONG PLAINTIFF

V.

DAWSON SPRINGS INDEPENDENT
SCHOOL DISTRICT, et al.

ORDER

The remaining Defendant has moved to dismiss all claims in this case. This Court has carefully considered the issues in an accompanying Memorandum Opinion. Being otherwise sufficiently advised,

IT IS HEREBY ORDERED that so long as Dawson Springs continues to pay for the current level of education services provided by Career Visions (including transportation), it is in compliance with the Department of Education's final order dated September 28, 1999.

IT IS FURTHER ORDERED that, in the event of any disagreement as to the scope or nature of those services, Holly Long's appropriate remedy is to request a further ARC meeting or to initiate a due process proceeding pursuant to 20 U.S.C. Section 1415(f) and 707 KAR 1:340.

IT IS FURTHER ORDERED that the mpotions to dismiss of all remaining Defendants are SUSTAINED, the IDEAS and Section 1983 claims are DISMISSED WITH PREJUDICE; all remaining causes of action are DISMISSED WITHOUT PREJUDICE.

It is further ordered THAT ON OR BEFORE JANUARY 12, 2005, THE PARTIES SHOULD ADVISE THE Court whether this should be designated a final order.

This is not a final and appealable order.

December 20, 2004

Signed, John G. Heyburn II
Chief Judge, U.S. District Court

cc: Counsel of Record

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(3)

No. 07-1

Supreme Court, U.S.
FILED
JUL 23 2007
OFFICE OF THE CLERK

In The
Supreme Court of the United States

HOLLY LONG,

Petitioner,

vs.

DAWSON SPRINGS INDEPENDENT SCHOOL DISTRICT, DAVID BOGGS, COMMONWEALTH OF KENTUCKY, and STATE DEPARTMENT OF EDUCATION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Petitioner has presented compelling reasons, as defined in SUP. CT. R. 10, to grant the Petition where there is no conflict among the courts of appeal and the decision below is based on well-developed case law decided in accord with the policies and purposes underlying the Individuals with Disabilities in Education Act, 20 U.S.C. §§ 1415 *et seq.*, and 42 U.S.C. § 1983.

2. Whether the Petitioner's claims, if otherwise valid, are barred by the applicable statute of limitations.

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STATEMENT OF THE CASE

Holly Long ("Holly") claims she was denied a free appropriate public education by the Dawson Springs Independent School District ("Dawson Springs") in violation of the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1415 *et seq.* Holly also asserts a claim under 42 U.S.C. § 1983 ("§ 1983") for Dawson Springs' alleged violation of the IDEA. Holly's Petition should be denied because there is no compelling reason, as defined in SUP. CT. R. 10, to issue a Writ of Certiorari. There is no conflict among the courts of appeal relating to the issues raised. The well-established law developed under the IDEA, which is soundly based in the policies and purposes of the IDEA and § 1983, establishes that the United States District Court for the Western District of Kentucky (the "District Court") and the United States Court of Appeals for the Sixth Circuit (the "Sixth Circuit") correctly held that Holly failed to exhaust her administrative remedies and that general money damages, as opposed to reimbursement for educational expenses incurred, are not recoverable in an action under the IDEA. In addition, Holly's claims are barred by the applicable statute of limitations, so that even if she were correct concerning her IDEA and § 1983 claims, she is not entitled to the relief she seeks and there is no reason to grant her Petition.

Since a thorough discussion of the legal and factual background giving rise to this case was not included in Holly's Petition and is necessary to an understanding of the case, Dawson Springs provides it here.

I. Statutory and Regulatory Background.

The purpose of the IDEA is to ensure that disabled children attending public schools receive an education that is tailored to their individual circumstances. 20 U.S.C. § 1400(d)(1)(A) states one of the purposes of the IDEA is "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to

meet their unique needs and prepare them for further education, employment, and independent living." IDEA jurisprudence refers to a "free appropriate public education" by the acronym "FAPE."

In order to receive federal funding to assist them in providing services to disabled children, states must comply with the provisions of the IDEA. 20 U.S.C. § 1412. One of the cornerstones of the IDEA is the Individualized Education Program ("IEP"), 20 U.S.C. § 1414(d)(1)(A), a plan for educating a child based on that child's individual needs as determined by a detailed assessment of the child's status, capabilities, etc.

The Secretary of Education is charged with administering the IDEA and has promulgated regulations appearing at 34 C.F.R. Part 300. The state agency responsible for providing public education is referred to as the State Education Agency ("SEA") in those regulations. A local education agency such as a school board is referred to in the IDEA regulations as a Local Education Agency ("LEA"). 34 C.F.R. § 300.2(a)(i) and (ii). In Kentucky, the SEA is the Kentucky Department of Education ("KDE"). Dawson Springs is the LEA involved in the instant case. The KDE has adopted administrative regulations to comply with the requirements of the IDEA which appear at 707 KAR Chapter 1. Kentucky's administrative regulations, to a large extent, mirror the federal regulations appearing in 34 C.F.R. Part 300.

One of the principles permeating the IDEA and its implementing regulations is that decisions affecting a particular child should be made on the local level based on the input of the child's teachers and parents and others having specialized knowledge of the individual child's particular needs. To this end, Kentucky regulations require that an Admissions and Release Committee ("ARC") be formed for each special education child. The ARC is "responsible for developing, reviewing, or revising an individual education program (IEP) for a child with a disability." 707 KAR 1:280 Section 1(1). Once a child reaches the age of 14, the ARC determines the "transition

services" that should be provided to the child. 707 KAR 1:320 Section 3(2). "Transition services" are those services that are directed at assisting the child in moving "from school to post-school activities." 707 KAR 1:280 Section 1(55). The ARC consists of the child's parents, one of the child's regular education teachers, a special education teacher, a specialist in providing education to disabled children, and the child, if appropriate. 707 KAR 1:320 Section 3.

20 U.S.C. § 1415 provides remedies to a child who claims to have been denied a FAPE. These remedies include all rights, procedures and remedies available under federal law. 20 U.S.C. § 1415(l). Specifically, a child who claims to have been denied a FAPE may request a due process hearing, 20 U.S.C. § 1415(f), and may appeal the results of that due process hearing to the SEA. 20 U.S.C. § 1415(g). If dissatisfied with the decision of the SEA, the child may file a civil action in state or federal court. 20 U.S.C. § 1415(i)(2). One important proviso with respect to these remedies is the requirement of 20 U.S.C. § 1415(l) that before a civil lawsuit is filed, the child must exhaust all available administrative remedies. The statute states:

> Nothing in this *title [20 USCS §§ 1400* et seq.] shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973 [*29 USCS §§ 790* et seq.], or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this part [*20 USCS §§ 1411* et seq.], the procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under this part [*20 USCS §§ 1411* et seq.]. (Underlined emphasis added; italics in original.)

Subsections (f) and (g) of 20 U.S.C. § 1415(l) provide for a due process hearing and an appeal to the SEA from that

due process hearing. These remedies are provided in Kentucky pursuant to 707 KAR 1:340 Sections 7 and 8.

In 707 KAR 1:340 Section 15 the Kentucky regulations also provide a Complaint Resolution Procedure ("CRP") with respect to written complaints submitted pursuant to 34 C.F.R. §§ 300.660-662. Although an appeal to the KDE from a CRP is provided in 707 KAR 1:340 Section 15(4), no further appeal is provided and no right to pursue a civil action following the CRP is provided in the Kentucky regulations, the federal regulations, or the IDEA. The remedies the KDE may impose as the result of a CRP are limited to technical assistance activities, negotiations, and requiring the LEA to take corrective actions. 707 KAR 1:340 Section 15(6).

II. Procedural and Factual Background.

A. Procedural Background.

Holly filed a complaint on June 28, 2001, in the District Court seeking relief under several federal statutes, including the IDEA. The gravamen of Holly's complaint was that while she was a special education student at Dawson Springs from January 23, 1992, until November 28, 1994, she was denied a FAPE.[1] The District Court held, *inter alia*, (1) it did not have subject matter jurisdiction with respect to Holly's IDEA claims because she failed to exhaust her administrative remedies and (2) Holly was not entitled to general monetary damages under § 1983 for the alleged violation of the IDEA. Holly appealed the District Court's judgment to the Sixth Circuit, which affirmed the decision of the District Court in an unpublished opinion.

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[1] Although Holly's complaint alleged violations of several other federal statutes in addition to the IDEA, she has chosen to limit her appeal to her rights under the IDEA, since that is the only statutory source of substantive federal rights discussed in her brief before the United States Court of Appeals for the Sixth Circuit and in her Petition for Writ of Certiorari to this Court. This brief will, therefore, discuss only the IDEA as the statutory source of Holly's claimed substantive federal rights.

Holly has now petitioned this Court for a Writ of Certiorari.

B. Factual Background.

In support of its motion to dismiss the complaint and its renewed motion to dismiss the complaint in the District Court, Dawson Springs filed two affidavits of Dorinda Allen, its Director of Special Education. Record 5, Motion to Dismiss, Exhibit 1; Record 59, Response in Support of Renewed Motion to Dismiss, Exhibit 2. Holly made no effort in the District Court to controvert a single factual statement set forth in Ms. Allen's affidavits, since the facts set forth in those affidavits are extensively documented by attached exhibits. Together, these two affidavits and the documents attached thereto detail the events that led up to Holly's lawsuit. These events are summarized as follows.

In September 1994 Holly's mother, Carole Long ("Carole"), became dissatisfied with the education provided to Holly by Dawson Springs[2] and requested a due process hearing to determine whether Holly was receiving a FAPE. After the due process hearing had been scheduled by the KDE, Carole withdrew her request eight days before the hearing was to be held in November 1994. The due process hearing was cancelled and the case was closed by the KDE. Carol removed Holly from Dawson Springs in November 1994 and moved across the state to Oldham County, Kentucky, where Holly was enrolled in school and eventually received a certificate of completion, a special education student's equivalent of a high school diploma. After Holly moved to Oldham County in 1994, Dawson Springs had no further contact with her for three and one-half years.

In May 1998, approximately three and one-half years after Holly had been removed from Dawson Springs, Carole instituted CRP proceedings before the KDE on

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[2] It is undisputed that Holly is entitled to special education services.

Holly's behalf, alleging that Dawson Springs had not provided Holly a FAPE. Dawson Springs disputed Carole's claim. The KDE issued its final decision on September 28, 1999. The KDE's final decision held that Dawson Springs had denied Holly a FAPE, and that Holly was entitled to compensatory education. Consistent with the policy that educational needs should be determined initially at the local level by those most familiar with the child's individual needs, the KDE directed that an ARC meeting be convened to determine what compensatory education should be provided to Holly and required Dawson Springs to report the progress of the ARC to the KDE. The September 28, 1999, decision of the KDE states:

> Therefore, the student is entitled to compensation for educational services not provided. The Corrective Action Plan (CAP) requires the district to convene an ARC meeting with the student to determine how, when, where and in what form the services will be provided. The district must submit to this office copies of ARC meeting invitations as well as conference summary reports which describe the results of any ARC meetings held with the emancipated student by November 30, 1999. (Emphasis added.)

After the final decision of the KDE on September 28, 1999, Dawson Springs promptly scheduled an ARC meeting for November 16, 1999, to be held at Dawson Springs' offices in Hopkins County, Kentucky. Holly and Carole refused to attend that meeting. Carole would agree to attend a meeting only if it were held in Frankfort, Kentucky, and only if a representative of the KDE attended. The KDE refused to send a representative to the ARC meeting because the composition of the ARC is prescribed by regulation and the regulation does not include the KDE as a member of the ARC.

After the dispute concerning the KDE's participation in the ARC meeting was resolved, another ARC meeting was promptly scheduled for February 28, 2000. Dawson Springs agreed to hold the meeting in Frankfort, Kentucky, in order to accommodate Carole and Holly. When

the meeting was finally held, Dawson Springs voluntarily agreed to pay for two months of evaluation services by Career Visions, the entity Carole selected to provide compensatory education for Holly, and Carole accepted this proposal. An evaluation was needed because, at the time the ARC met, Dawson Springs had not been in contact with Holly for almost six years, during which time she had graduated from the Oldham County school system. The evaluation was to determine what form the compensatory education should take and how much compensatory education was appropriate.

Dawson Springs sent Career Visions a questionnaire to elicit information concerning the nature of Holly's needs and her ability to benefit from compensatory education. Career Visions, at Carole's direction, refused to respond to the questionnaire.

Career Visions finally issued a report setting forth its findings on May 16, 2000, although it did not respond to Dawson Springs' questionnaire. Dawson Springs promptly scheduled an ARC meeting for June 13, 2000, to discuss the report and sent advance written notice of the meeting. Holly and Carole, without explanation, failed to attend the scheduled meeting. Rather than proceed with the meeting in Holly's and Carole's absence, Dawson Springs, after unsuccessful attempts to contact Carole by phone on the day of the meeting, decided to reschedule the ARC meeting.

The ARC meeting was rescheduled for June 29, 2000. Before the meeting took place, Dawson Springs was advised that Holly was represented by an attorney, Mr. Ed Dove. Mr. Dove was unable to attend the scheduled meeting on June 29, 2000, and the ARC was canceled and rescheduled in order to accommodate Mr. Dove's schedule.

In an effort to resolve the matter, Dawson Springs offered to provide Holly with the compensatory education recommended by Carole's chosen vendor, Career Visions. The offer was sent to Mr. Dove. Career Visions recommended a program of instruction consisting of one and one-half hours of instruction per day, two days per week.

Dawson Springs offered to provide this recommended instruction through Career Visions at Dawson Springs' expense. Since Career Visions' recommendation stated no duration for the services to be provided, Dawson Springs offered 104 weeks (two years) of compensatory education; Dawson Springs reasoned that since Holly had actually attended school in Dawson Springs for a period of slightly less than two years,[3] two years of compensatory education would be appropriate.

The next communication Dawson Springs received was a phone call from Holly's attorney stating that he no longer represented Holly or Carole. Since Mr. Dove was no longer involved, and in order to ensure that Holly and Carole were aware of its offer, Dawson Springs communicated its offer directly to them in a letter from Superintendent David Boggs dated July 13, 2000.

On August 10, 2000, Dawson Springs heard from a new attorney who had been retained to represent Holly, Mr. Teddy B. Gordon. Mr. Gordon took an aggressive stance, threatening a federal lawsuit unless Dawson Springs would agree to furnish, not two, but three years of compensatory education; Mr. Gordon further demanded that during that three years Holly must receive two hours of instruction three days a week, whereas the recommendation of Career Visions, Carole's chosen vendor, was for one and one-half hours of instruction two days per week. The new demand constituted a 50% increase in the duration of the compensatory education (three years vs. two years) and a 100% increase in the amount of compensatory education to be furnished each week (three hours vs. six hours); no explanation was given as to why the demand exceeded the recommendations of Career Visions, which Carole had selected to be the entity that would provide compensatory education to Holly.

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[3] Holly was enrolled in school in Dawson Springs from January 28, 1992, until November 7, 1994, a period of slightly over two years. Holly attended school in the Dawson Springs school district for 97 weeks during this period of time.

Upon receiving Mr. Gordon's demand, Dawson Springs promptly scheduled an ARC meeting for August 30, 2000, to discuss his proposal. Without explanation, neither Mr. Gordon nor Carole attended the ARC meeting, so the meeting was rescheduled for September 20, 2000. At the ARC meeting of September 20, 2000, Mr. Gordon made a new demand: that in addition to compensatory education, Dawson Springs must purchase an expensive state-of-the-art graphics computer for Holly's use at home. There was some discussion of a compromise and the parties agreed to reconvene after Career Visions completed the questionnaire Carol had previously instructed Career Visions not to provide (the questionnaire addressing Holly's needs and her ability to benefit from the proposed compensatory education).

Upon receiving the completed questionnaire from Career Visions, Dawson Springs promptly scheduled another ARC meeting for November 17, 2000. On November 17, 2000, Dawson Springs agreed to the demand, first presented at the September 20, 2000, ARC meeting, that Holly be furnished with the use of an expensive state-of-the-art graphics computer, but maintained its position regarding the amount of compensatory education to be provided by Dawson Springs. Knowing that the meeting had not concluded, Holly and her representatives nevertheless withdrew from the meeting. The meeting continued and the ARC adopted Dawson Springs's proposal.[4] Holly was notified in writing of the ARC's decision.

Thus, the September 28, 1999, final decision of the KDE, directing that an ARC be convened to develop a compensatory education plan for Holly, was implemented in spite of Carole's failure to cooperate with efforts to comply with that decision (unexplained failure to attend four ARC meetings), as well as her actual obstruction of Dawson Springs' efforts (directing Career Visions to ignore

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[4] The KDE had previously advised Dawson Springs that the ARC was required to adopt a compensatory education plan regardless of Carole's lack of cooperation with the ARC.

Dawson Springs' questionnaire), and only after Carole withdrew from the final ARC meeting knowing the meeting was not completed. Carole took the position, which she still maintains, that when the KDE determined, on September 28, 1999, that Holly was entitled to compensatory education, Carole was given a blank check to dictate what compensatory education would be provided and the length thereof. The KDE's September 28, 1999, decision, as quoted above, did not go so far, but left it to the ARC to determine what compensatory education was appropriate.

As of November 17, 2000, the date the ARC prescribed the compensatory education that should be provided to Holly, the regulatory framework provided that a party aggrieved by the decision of an ARC had two alternate procedures available to challenge the ARC's decision: (1) a due process hearing, or (2) if voluntarily agreed to, mediation. 707 KAR 1:340 Sections 5 and 6. Rather than pursue the remedies provided by regulation, Holly's attorney demanded that the KDE force Dawson Springs to accede to his previous demands. The KDE, in response, advised Holly's attorney that since the ARC had prescribed the compensatory education services to be provided to Holly, Dawson Springs had complied with the KDE's final decision rendered September 28, 1999, and the KDE was closing its case. The KDE advised the Longs and their attorney of the correct procedure for contesting the ARC's decision as set forth in 707 KAR 1:340 Sections 5 and 6.

Holly's attorney ignored the prescribed procedures for resolving disputes between the ARC and the student, and made the same demand one month later on January 17, 2001. The KDE's response was the same as it had been one month previously.

One month later, on February 14, 2001, Holly agreed to participate in mediation, one of the administrative remedies provided for a student dissatisfied with the decision of her ARC. The KDE appointed one of its most experienced mediators, Mr. John Llewellyn, and a pre-mediation conference was held on May 22, 2001. Dawson Springs offered a compromise that would provide Holly

with the three years of compensatory education she demanded, but with periodic evaluations to ensure that Holly was, in fact, benefiting from the services provided. Carole withdrew from the mediation process and it was never completed; rather, this lawsuit was filed on June 28, 2001. On July 23, 2001, shortly after the lawsuit was filed, Mr. Gordon withdrew from representing Holly and Mr. Leon Rudloff, Holly's present counsel, was retained.

During the course of the proceedings in the District Court, Carole refused to allow Holly to begin the course of compensatory education prescribed by Holly's ARC on November 17, 2000. Dawson Springs sought and was granted an order of the District Court directing that Holly begin the compensatory education to be provided by Career Visions. Since Dawson Springs had previously offered to provide three years of compensatory education at the pre-mediation conference subject to periodic evaluations to determine that Holly was making progress, the District Court proposed and Dawson Springs agreed that three years of compensatory education would be provided. Holly has now received three full years of compensatory education from Career Visions.

In summary, Carole, on Holly's behalf, has on three occasions abandoned prescribed administrative remedies when Dawson Springs did not unconditionally accede to her demands:

- Carole abandoned the November, 1994, due process hearing she requested;
- Carole withdrew from the November 17, 2000, ARC meeting held in compliance with the KDE's September 28, 1999, decision;
- Carole withdrew from the mediation that took place immediately before this case was commenced.

SUMMARY OF ARGUMENT

SUP. CT. R. 10 states that there must be a compelling reason for granting a Petition for Writ of Certiorari and

enumerates the following factors that will trigger a grant of a Petition for Writ of Certiorari:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

None of these criteria are present in the instant case and there is no compelling reason to grant the Petition. Rather, the decisions of the District Court and the Sixth Circuit are based on well-established law that is firmly grounded in the purposes and policies underlying the IDEA and § 1983.

The Sixth Circuit correctly affirmed the District Court's decision that Holly's claim under the IDEA is barred by her failure to exhaust her administrative remedies. Holly's contention that pursuing her administrative remedies would have been futile was not eligible for consideration by the Sixth Circuit and is not eligible for consideration by this Court because that contention was not made in the District Court; in any event, the facts of the case demonstrate that Holly's pursuit of the available administrative remedies would not have been futile, since she was successful in pursuing those remedies, insofar as she did so, before filing her action in the District Court.

Holly, who claims no unreimbursed educational expenses, is not entitled to general money damages either under the IDEA or § 1983. Case law makes it clear that such damages are not available in an action directly under the IDEA. Since § 1983 creates no remedies, but merely provides a mechanism to enforce remedies created by substantive federal law, Holly cannot obtain money damages by asserting a claim based on a violation of the IDEA under § 1983.

Even if Holly had valid claims under the IDEA or § 1983, they are barred by the applicable statute of limitations.

ARGUMENT

I. Holly Was Required to Exhaust Her Administrative Remedies Before Bringing a Civil Action in the District Court.

A. The statutory exhaustion requirement serves salutary purposes and applies whenever relief that is available under the IDEA is sought.

The law regarding exhaustion of administrative remedies is well established, both generally and as it applies to IDEA cases. There is no allegation in the Petition that there is any conflict among the courts of appeal as to the law applicable to the exhaustion requirement.

The federal appellate courts have clearly held that 20 U.S.C. § 1415(l) means exactly what it says: before a civil action may be brought in which the relief sought is available under the IDEA, the putative plaintiff must exhaust all available administrative remedies. 20 U.S.C. § 1415(l) states, in relevant part:

> [b]efore the filing of a civil action under such laws seeking relief that is also available under this part, the procedures under subsections (f) and (g) shall be exhausted . . .

At least seven of the twelve federal courts of appeal have so held in ten published opinions. *See Gean v. George W. Hattaway*, 330 F.3d 758, 773 (6th Cir. 2003); *Robb v. Bethel School District #403*, 308 F.3d 1047, 1048 (9th Cir. 2002); *Cudjoe v. Independent School District No. 12*, 297 F.3d 1058, 1063 (10th Cir. 2002); *Polera v. Board of Education*, 288 F.3d 478, 488 (2nd Cir. 2002); *Frazier v. Fairhaven School Committee*, 276 F.3d 52, 56 (1st Cir. 2002); *Weber v. Cranston School Committee*, 212 F.3d 41, 52 (1st Cir. 2000); *Rose v. Yeaw*, 214 F.3d 206, 210 (1st Cir. 2000); *Covington v. Knox County School System*, 205 F.3d 912, 916 (6th Cir. 2000); *Babicz v. School Board of Broward County*, 135 F.3d 1420 (11th Cir. 1998); and *Charlie F. v. Board of Education of Skokie School District*, 98 F.3d 989 (7th Cir. 1996).

As pointed out by these courts, the policy underlying the IDEA requires that one who is dissatisfied with a LEA's attempt to provide a FAPE must exhaust all available administrative remedies before going to court. That underlying policy is that the LEA and the student's ARC, which possess far more expertise in matters of education than federal courts, should be given the opportunity to provide a FAPE before the matter is litigated. As stated in the often-cited case of *Charlie F.*, *supra*:

> Under the IDEA, education professionals are supposed to have at least the first crack at formulating a plan to overcome the consequences of educational shortfalls.

98 F.3d at 992.

Other policy considerations mandate that administrative remedies be exhausted before an IDEA lawsuit is filed. The court in *Cudjoe*, *supra*, describes these considerations as follows:

> Besides the statute's straightforward and explicit requirement that plaintiffs exhaust administrative measures for available relief before filing a civil action, the policy supporting the exhaustion requirement also counsels that parents turn first to educational professionals, as opposed to courts, to

> remedy disputes over a child's education. The IDEA's design provides a "carefully structured procedure for administrative remedies," which encourages parents to seek relief quickly when the injury occurs and "allows the educational system to bring its expertise to bear in correcting its own mistakes."
>
> * * *
>
> Aside from the unique advantages realized by the student from having educational experts address the shortcomings in the student's education in the first instance, other benefits flow from requiring exhaustion of administrative remedies, such as allowing the agency to exercise its discretion and correct its own mistakes, and to develop technical issues and a factual record fully prior to court review.
>
> * * *
>
> The factual record developed is "an invaluable resource for a state or federal court required to adjudicate a subsequent civil action covering the same terrain." *Id.* Exhaustion generally "is credited with promoting accuracy, efficiency, agency autonomy and judicial economy," [citations omitted] and in the realm of special education, its benefits, both to the student and to the judiciary, prove to be even more valuable.

297 F.3d at 1065-66.

The reasoning of the courts of appeal requiring the exhaustion of administrative remedies is sound; thus, there is no reason for this Court to grant Holly's Petition in order to re-examine the wisdom of the decisions cited immediately above.

B. Holly's participation in the CRP did not exhaust her administrative remedies.

Holly seeks to excuse her failure to exhaust her administrative remedies by claiming that she exhausted her administrative remedies when she obtained a final

decision from the KDE that she was denied a FAPE by Dawson Springs and Dawson Springs should provide her with compensatory education. The flaw in Holly's argument is that the final decision of the KDE did not complete the administrative process. Rather, the final decision of the KDE rendered September 28, 1999, required Dawson Springs to convene an ARC meeting to "determine how, when, where and in what form the services will be provided." The KDE's decision not to attempt a determination as to "how, when, where and in what form" compensatory education services would be provided to Holly is entirely consistent with one of the primary policies underlying the IDEA – that decisions about the services to be provided to a special education student are best left to the student's ARC, which includes the student, the student's parents, a regular teacher, a special education teacher, and an expert in special education. The members of the ARC are better suited to determine what services should be provided to a particular student because they are familiar with the particular student's status, capabilities and requirements and have individualized testing procedures available to evaluate the student in order to tailor educational services to the student's individual needs.

When the KDE rendered its final decision in the CRP proceeding, Holly had only completed part of the journey which would end in a determination of the compensatory education services she would receive. Holly subsequently abandoned that journey on two occasions: (1) Holly abandoned the November 17, 2000, ARC meeting before it was completed; and (2) Holly abandoned the mediation procedures commenced in May of 2001.[5]

Holly complains that, having won a victory before the KDE as a result of the CRP, she should not be required, as provided in the applicable administrative regulations, to pursue a due process hearing and an appeal to the Exceptional Children Appeals Board before coming to federal

[5] Holly had previously abandoned the due process hearing she requested that was scheduled for November 1994.

court because such a procedure unduly delays her receipt of compensatory education. The answer to this complaint is fourfold: (1) this matter could have been resolved in 1994 if Holly had pursued the due process hearing that was scheduled for November of that year and, if necessary, the subsequent appellate and civil action remedies that were available at the time; (2) much of the delay of which Holly complains since she began the CRP procedure is the result of the actions of her own representatives; (3) in 1998 Holly could have foregone the CRP, requesting an immediate due process hearing, thus avoiding that portion of the delay she complains of consisting of the time during which the case was pending before the KDE; and (4) the facts set forth above demonstrate that Dawson Springs acted timely in scheduling an ARC meeting following the KDE's 1999 decision in the CRP proceedings and in continuing to reconvene ARC meetings in a timely manner in an attempt to resolve the issue, despite Carole's refusal to participate and obstruction of the process.

In any event, Holly cites no rule of law that excuses her from exhausting available administrative remedies merely because they are time-consuming.

The exhaustion mandate of 20 U.S.C. § 1415(l) is clear and unequivocal. Numerous United States courts of appeal have applied the exhaustion requirement based on the salutary policy considerations underlying it. Holly clearly abandoned the administrative remedies provided to her on multiple occasions. The District Court was correct in dismissing Holly's claim due to her failure to exhaust available administrative remedies, belying any reason for granting Certiorari.

C. Holly's argument that pursuing the available administrative remedies would have been futile was waived because it was not made in the District Court; the argument is unsupported by the facts in any event.

Holly's final attempt to avoid the consequences of her failure to exhaust her administrative remedies consists of

her argument that it would have been futile to do so. This argument was rightly rejected by the Sixth Circuit, however, because it was not made in the District Court. *Wright v. Holbrook*, 794 F.2d 1152 (6th Cir. 1986). This Court has likewise held that, generally, a new argument cannot be advanced on review that was not preserved in the proceedings below. *City of Springfield v. Kibbe*, 480 U.S. 257, 259 (1987).

Even if the futility argument was not waived by failing to make it in the District Court, the facts summarized above dispel any allegation of futility because to the extent she pursued her administrative remedies Holly was successful, as demonstrated by the following facts.

In September 1994, Carole alleged that Dawson Springs had not provided Holly with a FAPE. At Carole's request, the KDE scheduled a due process hearing to be held in November 1994. Carole withdrew her request for a hearing eight days before the hearing was held and the KDE closed its file. Nothing surrounding these events suggests that it would have been futile for Holly to pursue the due process hearing. After all, it was Carole who cancelled the hearing.

After Holly completed her education in Oldham County, Carole commenced a CRP proceeding against Dawson Springs before the KDE in 1998, again contending that Dawson Springs failed to provide Holly a FAPE while she was enrolled at Dawson Springs. The KDE decided the issue against Dawson Springs, finding in its final decision dated September 28, 1999, that Holly had not been provided a FAPE and that Holly was entitled to compensatory education. Since the proceedings before the KDE were resolved in Holly's favor, it certainly cannot be said that the proceeding was futile.

While the KDE found Holly was entitled to compensatory education, it appropriately refrained from determining precisely what Holly's compensatory education should be. Instead, the KDE directed that an ARC be convened to prescribe the appropriate compensatory education.

The ARC meeting required by the KDE in its September 28, 1999, decision was finally held on November 17, 2000. When Dawson Springs did not accede to Carole's demands, Holly and her representatives withdrew from the meeting with full knowledge that the meeting had not been concluded. Despite the obstructionism by Holly's representatives for over a year between September 28, 1999, and November 17, 2000, the ARC adopted a proposal consistent with Career Vision's recommendation: that Holly be provided with one and one-half hours of compensatory education two days per week by Career Visions for two years at Dawson Springs' expense. Any allegation of futility in connection with the November 17, 2000, ARC meeting is dispelled by the fact that, despite Carole's obstructionism and her attorney's arbitrary demands and threats, and despite the withdrawal of Holly and her representatives from the meeting, the ARC adopted a plan consistent with the recommendations of Career Visions, the vendor Carole chose to provide compensatory education to Holly.

After the ARC complied with the KDE's September 28, 1999, decision, two remedies were available to address Carole's dissatisfaction with the compensatory education awarded by the ARC. 707 KAR 1:340 Sections 5 and 6 provided (1) a due process hearing and (2) mediation, if voluntarily selected by Holly. Based on the facts that had occurred through November 17, 2000, there was no reason to believe that these procedures would be futile, since the proceedings to date had resulted in administrative decisions that awarded Holly the compensatory education that was recommended by her chosen vendor, Career Visions.

After a pre-mediation conference held May 22, 2001, at which Dawson Springs made a proposal to provide three years of compensatory education, Holly withdrew from the mediation process and filed her complaint in the District Court. The fact that at the mediation Dawson Springs offered to provide even more compensatory education than had been awarded by the ARC on November 17, 2000, belies any allegation of futility in the mediation process.

In summary, there is no factual basis for Holly's allegation that the administrative remedies available, which she successfully invoked but then abandoned, would have been futile. To the contrary, those procedures resulted in the KDE's September 28, 1999, decision in Holly's favor. As the result of the administrative proceedings that followed the KDE's September 28, 1999, decision, Dawson Springs voluntarily agreed to pay for a two-month evaluation of Holly and ultimately the ARC awarded Holly the very compensatory education recommended by the vendor Carole had chosen. At the pre-mediation conference held in May 2001 Dawson Springs offered to provide even more compensatory education than was awarded by the ARC on November 17, 2000. Holly's response was to abandon the mediation.

Since it is clear that there is no factual basis for Holly's allegation that exhaustion of her administrative remedies would have been futile, there is no compelling reason for this Court to grant Holly's Petition for Writ of Certiorari. Even if Holly's substantive claims had merit, which they do not, she has no right to assert them because she failed to first comply with the requirement that she exhaust the administrative remedies available to her. Since the case was properly disposed of based on Holly's failure to fulfill the exhaustion requirement, there is no basis for granting her Petition for Writ of Certiorari.

II. Holly Is Not Entitled to Money Damages Under § 1983.

Holly, who has no claim for educational expenses, contends she is entitled to general money damages because she asserted a claim under § 1983 in addition to her claim under the IDEA. This contention is erroneous for two reasons: (1) Holly's failure to exhaust her administrative remedies bars *any* claim based on an alleged failure to provide a FAPE, including a claim under § 1983, and (2) because § 1983 creates no remedies, but merely provides a vehicle for enforcing remedies created by other Federal law, and because general money damages, as opposed to

restitution for educational expenses, are not recoverable under the IDEA, money damages are not available in a § 1983 action seeking to enforce the IDEA.

A. Holly's failure to exhaust her administrative remedies bars her § 1983 claim under the IDEA.

20 U.S.C. § 1415(l) makes it abundantly clear that the exhaustion requirement applies whenever the relief sought is relief that is available in an action directly under the IDEA, regardless of which federal statute or other federal law provides the vehicle for bringing the claim to court. This principle applies to Holly's § 1983 claim since her claim is based on the allegation that Dawson Springs denied her a FAPE.

B. General money damages, as distinguished from reimbursement for educational expenses, are not available in a claim brought under § 1983 for an alleged failure to provide a FAPE.

In the circumstances of the instant case the District Court and the Sixth Circuit found it unnecessary to decide whether a claim for an alleged violation of the IDEA may be brought under § 1983, an issue on which there is apparently some dispute. *See W.B. v. Matula*, 67 F.3d 484 (3rd Cir. 1995) and *Padilla ex rel. Padilla v. School Dist. No. 1 in City and County of Denver, Colo.*, 233 F.3d 1268 (10th Cir. 2000). The reason it is unnecessary for this Court to address this issue through the vehicle of a Writ of Certiorari is that even assuming, for the sake of argument, that § 1983 can be used to enforce the IDEA, money damages are not available in such an action. Holly has already received the compensatory education to which the District Court determined she is entitled – she has incurred no unreimbursed educational expenses and is no longer seeking a FAPE, but seeks only general monetary damages.

It is black-letter law that § 1983 does not create any substantive rights, but merely provides an enforcement mechanism for federally protected rights created by the United States Constitution and the laws enacted pursuant thereto. *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600 (1979); *Gardenshire v. Schubert*, 205 F.3d 303 (6th Cir. 2000); *Crocker v. Tennessee Secondary School Athletic Association*, 980 F.2d 382 (6th Cir. 1992). Thus, Holly cannot, by seeking to enforce the IDEA through the mechanism of § 1983 in addition to her direct enforcement action, create remedies in addition to those available in an action directly under the IDEA.

The decisions of the various federal courts of appeal establish that there is no right to general money damages, as opposed to restitution for incurred educational expenses, in an action brought directly under the IDEA. Early on the Sixth Circuit held general money damages are not available in a direct action under the IDEA. *Crocker* specifically held that general monetary damages are not available under the IDEA; the only relief available under that statute is restitutionary relief. The court stated in *Crocker*:

> Other cases under the Act have limited monetary damages to restitutionary types of relief. They have allowed restitution to parents for the expense of providing educational services for the handicapped child, but we do not find case authority interpreting the Act to allow an award of general damages for emotional injury or injury to a dignitary interest.

980 F.2d at 386.

Six of the twelve federal courts of appeal have followed suit in eight published decisions. *See Diaz-Fonseca v. Puerto Rico*, 451 F.3d 13 (1st Cir. 2006); *J.S. v. Isle of Wight County School Board*, 402 F.3d 468 (4th Cir. 2005); *Polera v. Board of Education*, 288 F.3d 478 (2nd Cir. 2002); *Nives-Marquez v. Puerto Rico*, 353 F.3d 108 (1st Cir. 2003); *Witte v. Clark County School District*, 197 F.3d 1271 (9th Cir. 1999); *Sellers v. School Board of Manassas, Va.*, 141 F.3d 524 (4th Cir. 1998), *cert. den.*, 525 U.S. 871 (1998);

Charlie F. v. Board of Education of Skokie School Dist., 98 F.3d 989 (7th Cir. 1996) and *Heidemann v. Rother*, 84 F.3d 1021 (8th Cir. 1996).

The reasoning of these courts is unimpeachable: since there is no right to general money damages (as opposed to reimbursement for educational expenses) in an action brought directly under the IDEA, and since § 1983 is merely an enforcement vehicle that creates no rights, there is no claim for general money damages under § 1983 for an alleged failure to provide a FAPE.

The cases cited at pages 7-8 of Holly's Petition for the proposition that " . . . monetary damages are available under Section 1983 in IDEA matters . . . " do not support that proposition. Several of the cases Holly relies upon involved restitution for educational expenses, not a claim for general monetary damages, and are distinguishable from the instant case in which Holly does not claim to have incurred any unreimbursed educational expenses, but seeks only general monetary damages. These cases include *W.B. v. Matula*, 67 F.3d 484 (3rd Cir. 1995); *Salley v. St. Tammany Parish School Bd.*, 57 F.3d 458 (5th Cir. 1995); *Quackenbush v. Johnson City School District*, 716 F.2d 141 (2nd Cir. 1983); *Jeremy H. by Hunter v. Mount Lebanon School Dist.*, 95 F.3d 272 (3rd Cir. 1996); and *St. Tammany Parish Sch. Bd. v. State of La.*, 142 F.3d 776 (5th Cir. 1998). This Court has previously approved the award of restitutionary educational expenses in *Town of Burlington v. Dept. of Ed. of Mass.*, 471 U.S. 359 (1985) but has not approved an award of general monetary damages in an IDEA case. *Samuels v. District of Columbia*, 770 F.2d 184 (D.C. Cir. 1985) did not even involve the IDEA, but involved an allegation that the District of Columbia failed to promulgate an administrative grievance procedure with respect to public housing. *P.C. v. McLaughlin*, 913 F.2d 1033 (2nd Cir. 1990) was decided on the basis of qualified immunity, not whether the plaintiff was entitled to money damages. *Mrs. W. v. Tirozzi*, 832 F.2d 748 (2nd Cir. 1987) does not address the issue of money damages, nor do *Marie O. v. Edgar*, 131 F.3d 610 (7th Cir. 1997); *Mallett v. Wis. Div. of Vocational Ed.*, 130

F.3d 1245 (7th Cir. 1997); or *Digre v. Roseville Schools Ind. Dist.*, 841 F.2d 245 (8th Cir. 1988). In *Robinson v. Pinderhughes*, 810 F.2d 1270 (4th Cir. 1987) the court explicitly stated "We express no opinion either on the question of damages or injunctive relief." *Id.* at Footnote 3. *Fontenot v. Louisiana Bd. of Elem. & Secondary Ed.* 805 F.2d 1222 (5th Cir. 1986) involved the issue of attorney's fees, not compensatory damages, as did *Angela L. v. Pasadena*, 918 F.2d 1188 (5th Cir. 1990).

Thus, while several courts, including this Court, have held that in an IDEA case a school district may be ordered to reimburse the student or parents for educational expenses incurred for services that should have been provided by the public school, no court has allowed the recovery of general monetary damages as Holly seeks in the instant case. In fact, the only courts to examine the issue have squarely held that general monetary damages are not recoverable in an IDEA case. There is no conflict among the courts of appeal as to the availability of general monetary damages in an IDEA case. The clarity of the law with regard to the issue whether money damages are available for failure to provide a FAPE and the sound reasoning of the courts that have denied such a remedy demonstrate that there is no compelling reason for this Court to grant Holly's Petition for Writ of Certiorari in order to re-examine the issue.

III. Holly's Claims Are Barred by the Statute of Limitations.

The fact that Holly's claims are barred by the statute of limitations militates against granting her Petition for Writ of Certiorari. Even if there were some compelling reason to examine the issues raised in Holly's Petition, she is not entitled to the relief she seeks because her claims are barred by the statute of limitations.

Dawson Springs raised the applicable statute of limitations as a defense to Holly's claims in the District Court. In the Sixth Circuit Dawson Springs asserted the statute of limitations as alternative grounds for affirming

the District Court's dismissal of Holly's claims under the rule that the District Court's decision should be affirmed if correct for any reason, including a reason not relied upon by the District Court. *Andrews v. Ohio*, 104 F.3d 803 (6th Cir. 1997). In view of the resolution of other issues by the District Court and the Sixth Circuit, it was not necessary for those courts to reach the statute of limitations issue. It is clear, however, that Holly's claims are barred by the applicable statute of limitations.

Holly's mother requested an administrative due process hearing pursuant to 20 U.S.C. § 1415(f) on September 29, 1994, asserting that Dawson Springs had failed to provide Holly with a FAPE. The complaint in the instant case was not filed until almost seven years later on June 28, 2001.

A. Holly's claims accrued no later than September 29, 1994.

The first step in applying a statute of limitations is to determine when the claim accrued, i.e., when the time for filing the action began to run.

The time when a federal cause of action accrues is determined by federal, not state, law. *M.D. v. Southington Board of Education*, 334 F.3d 217 (2nd Cir. 2003); *Leon v. Murphy*, 988 F.2d 303 (2nd Cir. 1993). Federal law generally holds that a federal cause of action accrues when the plaintiff knows, or has reason to know, that a federal cause of action exists. *Id.*

Applying these principles, the Sixth Circuit long ago held, under the IDEA'S predecessor,[6] that a cause of action for failure to provide a FAPE accrues no later than when an effort is first made to enforce the right to a FAPE. *Janzen v. Knox County Board of Education*, 790 F.2d 484 (6th Cir. 1986). Following this rule, the Sixth Circuit held in *James v. Upper Arlington City School District*, 228 F.3d

[6] The Education of All Handicapped Children Act, 20 U.S.C. §§ 1401, *et seq.*

764 (6th Cir. 2000) that the statute of limitations began to run when the child was removed from the school district. Other circuits have reached the same result: *R.R. v. Fairfax County School Board*, 338 F.3d 325 (4th Cir. 2003), and *M.D. v. Southington Board of Education*, *supra*. The rule that the statute of limitations begins to run when an effort is first made to enforce the right to FAPE is consistent with the policies and objectives of the IDEA. If a child has been denied a FAPE, corrective action should be taken at the earliest possible time and should be offered by the LEA where the denial occurred so as to allow the LEA to correct its own mistakes.

Holly's claim under the IDEA is based on Dawson Springs' alleged failure to provide her with a FAPE. Under well-established case law, these claims accrued on September 29, 1994, when Carole requested an administrative due process hearing.

B. Holly's IDEA claim is barred by the statute of limitations.

The IDEA does not contain a statute of limitations; therefore, the Kentucky statute of limitations applicable to the most analogous Kentucky cause of action applies. Two Kentucky statutes of limitation might possibly apply to this case: the one-year statute of limitations for personal injury contained in KRS 413.140 or the five-year statute of limitations for actions upon a liability created by statute when no other time is fixed by the statute creating the liability, KRS 413.120. There appears to be no published opinion determining which statute of limitations applies in Kentucky in an action under the IDEA. In *King v. Floyd County Bd. of Ed.*, 228 F.3d 622 (6th Cir. 2000), the Sixth Circuit held, however, that a 30-day statute of limitations applies to appeals from the decisions of administrative agencies. Thus, insofar as Holly's complaint might be considered an appeal from the September 28, 1999, final determination of the KDE, the appeal was obviously untimely.

Holly's present action under the IDEA is untimely under either of the Kentucky statutes of limitation cited above. The cause of action accrued in September 1994 when Holly's mother complained that Dawson Springs was not providing a FAPE to Holly and requested a due process hearing to remedy the alleged failure. Holly's complaint was not filed until June 28, 2001, over six and one-half years after the cause of action accrued.

In the District Court, Holly attempted to avoid application of the statute of limitations by asserting that the statute was tolled by her disability. As two federal courts of appeal have held, however, the application of tolling provisions is inconsistent with the purposes of the IDEA. When confronted with arguments that state law tolling provisions tolled the statute of limitations under the IDEA, two federal courts of appeal held the application of tolling provisions is inconsistent with federal law and refused to apply them: *M.D. v. Southington Board of Education*, 334 F.3d 217 (2nd Cir. 2003) and *Strawn v. Missouri State Board of Education*, 210 F.3d 954 (8th Cir. 2000). In *M.D. v. Southington Board of Education* the Second Circuit states:

> The Supreme Court has clarified that federal courts must borrow a state's equitable tolling rules *unless* to do so "would defeat the goals of the federal statute at issue." *Hardin v. Straub, 490 U.S. 536, 539, 104 L. Ed. 2d 582, 109 S. Ct. 1998 (1989)*; *see also Pearl, 296 F.3d at 80*. One of the fundamental goals of the statutory scheme codified in the IDEA is to promote the expeditious resolution of educational programming disputes. *See Adler v. Educ. Dep't of State of New York, 760 F.2d 454, 459-60 (2d Cir. 1985)*. Application of the equitable tolling provision of *§ 10-76h(a)(3)* to causes of action that accrued prior to the enactment of that statute would defeat this purpose of the IDEA by permitting claims to be brought long after their accrual date. Accordingly, we hold that the application of the

> equitable tolling rule to such cases, including this one, would "defeat the goals" of the IDEA.

334 F.3d at 224 (italics in original).

In *Strawn*, the Eighth Circuit rejected the application of a five-year statute of limitations for the following reasons:

> The statutory framework of the IDEA and the statute's purpose show that a five-year statute of limitations would frustrate the federal policy of quick resolution of IDEA claims. The IDEA provides for substantial parental involvement in the IEP process, annual reviews, and annual notice to parents of procedural rights. See *20 U.S.C. §1414*(d)(B)(i) (parents must be part of IEP team); *20 U.S.C. §1414*(d)(4)(A)(i) (annual review); *20 U.S.C. §1415*(b)-(d) (notice of procedural rights). This statutory scheme mandating parental participation in an annual decision-making process demonstrates that Congress intended for parents to be actively implicated in the expeditious resolution of IDEA concerns. In addition, children protected by the IDEA benefit greatly from quick resolution of disputes because lost education is a substantial harm, and that harm is exactly what the IDEA was meant to prevent. See *Murphy, 22 F.3d at 1193-94* (central federal policy of IDEA is not to lose "day after irreplaceable day of educational opportunity").

210 F.3d at 957-58 (italics in original).

For these same reasons, the *Strawn* court refused to toll the statute of limitations, stating:

> [w]e decline to apply a tolling provision for minors because tolling the statute of limitations for an entire childhood would frustrate federal policy even more than a five-year statute of limitations.

210 F.3d at 958.

To summarize: The applicable statute of limitations is no more than five years. The limitation period began to run no later than September 1994, when Holly's mother

requested a due process hearing to enforce Holly's right to a FAPE. Instead of pursuing that process, Carole removed Holly to another school district from which Holly received a certificate of completion four years later. Dawson Springs was deprived of the opportunity to provide a free appropriate public education to a student in her early teens and was deprived of the opportunity to correct any mistakes early on. The pursuit of this case is contrary to the IDEA's policy that complaints concerning the services provided to a public school student be addressed and rectified on the spot, and is contrary to the policy underlying statutes of limitation which limit the time within which actions may be brought so as to avoid stale claims. Holly's claim is stale by any stretch of the imagination.

C. The statute of limitations has expired with respect to Holly's claim under § 1983, if she has one.

Kentucky's one-year statute of limitations, KRS 413.140, is applicable to claims under § 1983. *Collard v. Kentucky Bd. of Nursing*, 896 F.2d 179 (6th Cir. 1990). Accordingly, Holly's claim under § 1983, if she has one, is barred.

CONCLUSION

Holly has demonstrated no compelling reason, as described in SUP. CT. R. 10, why this Court should grant her Petition for Writ of Certiorari. The District Court and the Sixth Circuit relied on well-established law that is firmly grounded in the policies and purposes underlying the IDEA and § 1983 in holding that Dawson Springs was entitled to dismissal of Holly's claims.

The policy of the IDEA, as developed in the cases decided thereunder, is to require that the parties exhaust their administrative remedies, rather than bringing their dispute to a court before educational professionals have had an opportunity to make a reasoned determination as to what remedy is appropriate under the circumstances

and to make a detailed administrative record for a court to review. The salutary purposes of this policy are set forth above and need not be repeated.

Holly has no claim for general money damages, as opposed to restitution for educational expenses, either directly under the IDEA or under § 1983. Case law developed under the IDEA does not allow an award of such general money damages. It is elemental that § 1983 is merely a mechanism for enforcing substantive federal rights created elsewhere; § 1983, itself, creates no substantive rights. A complaining party cannot, by suing under § 1983 rather than under the IDEA directly, create a right to money damages that otherwise does not exist.

In either event, Holly's claims are barred by the statute of limitations which began to run in 1994 when Carole requested a due process hearing to address the issue whether Holly was being provided with a FAPE by Dawson Springs. Holly's lawsuit, filed six and one-half years later, is untimely. Since Holly is not entitled to the relief she seeks regardless of the merits of her claims under the IDEA and § 1983, her Petition should be denied.

Accordingly, Dawson Springs Independent School District and David Boggs request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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